

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

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)	
VARIETY STORES, INC.,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. 5:14-CV-217-BO
)	
)	
WALMART, INC.,)	
)	
Defendant.)	

TUESDAY, FEBRUARY 12, 2019
JURY TRIAL/PHASE II/DAY 2 of 2
BEFORE THE HONORABLE TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

MICHELLE A. MCGIRR, RPR, CRR, CRC
Official Court Reporter
United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

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I N D E X

WITNESS:

Kent Van Liere

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WITNESS:

Graham Rogers

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REBUTTAL WITNESS:

George Templeton Blackburn, III

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PLAINTIFF'S EXHIBITS:

<u>No.</u>	<u>In Evid.</u>
88 - 93, 95, 97 - 102, 13, 104, 113, 105, 109 - 111, 94 and 109 115	117 121

DEFENDANT'S EXHIBITS:

<u>No.</u>	<u>In Evid.</u>
148	20
DDX-10	37
DDX-11	42
DDX-158, 13, 9, 12	116

* * *

1 (Tuesday, February 12, 2019, commencing at 10:05 a.m.)

2 **P R O C E E D I N G S**

3
4 (Open Court)

5 (No Jury Present)

6 MR. SHAW: Good morning, your Honor. We have three
7 housekeeping matters to address. The first one, if I may
8 approach and hand a copy of some of the filings.

9 (Attorney Shaw providing documents to opposing counsel
10 and to the Deputy Clerk)

11 MR. SHAW: I've handed the Court Clerk a copy of
12 the proposed jury voir dire that we filed last night. I
13 don't know if the Court had a chance to review it since it
14 was filed last night, but Variety would simply ask that
15 either this morning when the jury comes in or prior to the
16 charge before the jury deliberates the Court conduct some
17 very simple voir dire of the jury. I don't believe Walmart
18 has filed an opposition to this request, not that I'm aware
19 of.

20 That's topic number one. If the Court wants to
21 conduct follow-up I'm happy to answer questions, or I can
22 move on to the second issue.

23 THE COURT: We're not going to do this again. Let
24 me start by saying that. And you're in -- you're trying to
25 make a mess out of something that I'm trying to make simple.

1 And so you don't have any idea what the answers to these
2 questions are going to be, and you're not going to get
3 another trial if you mistry this case by having two or three
4 jurors knocked off the jury. The federal rule that I
5 remember is you have between 6 and 12 civil jurors. If you
6 get down to five, then you're out of here. Is that what you
7 want to do?

8 MR. SHAW: No, your Honor.

9 THE COURT: Well, why are we doing this? I mean,
10 what's your next point?

11 MR. SHAW: Okay. The point number two, your Honor,
12 is the Court yesterday decided several of Walmart's motions
13 in limine. They had requested a specific ruling. Variety
14 has a similar request. It's simple. We did not file many
15 motions in limine, just one, a renewed motion. It's docket
16 entry 523 and relates back to docket entry 401, and it's
17 simply to disallow the testimony for Dr. Van Liere who
18 previously testified in this trial, the exact same expert,
19 the exact same survey that the Court found to be unreliable
20 at the October 2016 trial. So Variety would ask that Mr. Van
21 Liere not be allowed to testify again for a third time and
22 Walmart be allowed to try to rehabilitate him in front of the
23 jury in this phase. It would not only be prejudicial but
24 duplicative, and the Court has deemed him to be unreliable.
25 We would ask for a ruling on our motion if we could.

1 THE COURT: Denied.

2 MR. SHAW: The third issue, your Honor, is last
3 night Variety filed two motions for reconsideration. The
4 Court had granted Walmart's motion to preclude evidence put
5 on regarding deterrence, which is simply a justification for
6 the equitable remedy of disgorgement. Variety has throughout
7 the case maintained that this is a case for deterrence. The
8 Court has twice previously denied the identical motion that
9 Walmart filed. The Court has also previously found this is a
10 strong case for deterrence and Variety would be prejudiced by
11 not being allowed to argue to the jury that this is a case
12 for deterrence. That's the first motion that we filed.

13 The second motion that we filed for reconsideration
14 is with respect to the unfair competition, and we've reviewed
15 the pretrial filings including the proposed joint pretrial
16 order which would govern the proceedings here, and it's
17 always been part of the case. I don't believe that Variety
18 ever waived that expressly in any pleadings, and we would ask
19 that the Court reconsider that ruling as well. And that's
20 it.

21 THE COURT: You can have a seat.

22 MR. SHAW: Thank you.

23 THE COURT: Do you want to say anything?

24 MR. HOSP: Your Honor, if you are inclined to
25 entertain the motions I will address the arguments, but I

1 think we would rather get to the jury before lunch so we can
2 get this moving. We don't believe there's any basis to
3 reconsider the decisions. As far as Mr. Van Liere, Dr. Van
4 Liere, the testimony will be less than 10 minutes.

5 THE COURT: Well, I'm going to deny everything that
6 Variety asked for. All of these things in my experience are
7 -- potentially lead to making a mess out of the case and
8 that's not what I'm trying to do. I'm trying to bring
9 closure to it and some clarity, and I don't think that's your
10 position. So I'm going to deny everything you asked for on
11 the second morning of the trial.

12 Bring the jury back in.

13 (Jury in at 10:11 a.m.)

14 THE COURT: Good morning, ladies and gentlemen.
15 You can all have a seat.

16 Call your next witness.

17 MR. HOSP: Your Honor, we would call Dr. Kent Van
18 Liere.

19 **DR. KENT VAN LIERE**

20 having been duly sworn, testified as follows:

21 THE WITNESS: I do.

22 MR. HOSP: Your Honor, may I approach?

23 THE COURT: Yes.

24 (Attorney Hosp providing exhibit binder to the witness)

25 ///

DIRECT EXAMINATION

BY MR. HOSP:

Q. Dr. Van Liere, would you please just very briefly remind the jury who you are and what it is that you do.

A. I'm Kent Van Liere. I'm a retired managing director with NERA Economics, and I was a survey and sampling expert at NERA.

Q. Were you asked to perform a survey -- surveys in this case?

A. Yes, I was asked to do -- design a research that would measure the relative importance of the brand name Backyard Grill in consumers' decisions to purchase grill and grill products at Walmart.

Q. You've already given testimony to that survey, so can you very briefly remind the jury what the nature of your survey was intended to do?

A. Yes. So you might remember, but I did two surveys, two online surveys. One was a national survey and one was a regional survey, and we showed consumers images of grills and grill products with The Backyard brand on them and asked them what was important to them in their decisions to buy those products.

Q. And at a more specific level in terms of format and what they were actually shown and asked to do, can you remind the jury exactly what that was?

1 A. Yes. So basically we first screened the
2 respondents to see if they were in the market to purchase
3 grills and grill products and whether they would consider
4 purchasing them at Walmart in the next year. If they
5 qualified for the study, then we randomly assigned them to a
6 test condition or a control condition, and in each case they
7 were shown an image of the grills or the grill accessories
8 and they were given a list of features of those things and
9 they were asked to tell us which features made them more
10 likely to buy the products and which less likely to buy the
11 product. And we compared the test for the results and the
12 control and reported some tables and my conclusions.

13 Q. Based on the results of that survey, what were the
14 conclusions that you drew?

15 A. Well, the overall conclusion was that the brand
16 Backyard Grill was not causing consumers to be more likely to
17 want to purchase these products than a fictitious, neutrally
18 worded brand name, and thus I concluded the brand name was
19 not causing consumers to be more likely to buy the Backyard
20 Grill products at Walmart.

21 Q. In his closing last fall, Mr. Adams suggested that
22 your survey showed that nearly 40 percent of consumers are
23 more likely to buy a product labeled Backyard Grill. Is that
24 an accurate representation of your survey results?

25 A. No, that would not be an appropriate interpretation

1 if that suggested to the jury that the brand Backyard Grill
2 was important to consumers.

3 Q. Now, what I would like to do very briefly is have
4 you take a look at table 2 from Exhibit D-270.

5 A. I see that.

6 Q. And if you would for the jury, just based on your
7 results, walk through exactly what it is that you mean when
8 you say that that conclusion is improper.

9 A. There's two basic things I would want to show you
10 from this table. So on the left is -- for this particular
11 product is the list of the features that we asked consumers
12 to say whether they made them more or less likely to purchase
13 the products. And in the first two columns there is the
14 responses related to the actual Backyard Grill products with
15 the Backyard Grill brand. And the first thing you should
16 notice is that among the 11 things that we asked about, brand
17 is one of the lowest rated of all of the things. So this
18 suggests that product features, the size and capacity, price
19 are more important than the brand. So those results by
20 themselves suggest that the brand is not particularly
21 important among consumers. In fact, it's just barely more
22 important than two plastic wheels, which we wouldn't expect
23 to be a big reason why consumers were purchasing these
24 products.

25 The second thing I want you to notice is that, yes,

1 it's true if you look at that row at the bottom with the bar
2 around it with -- why don't you highlight that whole row in
3 yellow if you can so that you see the 34 percent there. It
4 is true that 34 percent said that the brand name Backyard
5 Grill in the test condition made them more likely to want to
6 purchase the product, but they may be just telling us that
7 brand is important to them, and the issue is whether brand --
8 the brand name Backyard Grill is important to them.

9 So the way we assess that is we use a control
10 group, and so the second two columns are the responses for
11 the people who saw the exact same image but with the
12 fictitious brand name Barbecue Grill on it. And if you look
13 at that same percentage in that row for the control
14 condition, it's 38 percent versus 34 percent. So that tells
15 us the responses in the test, it's not that consumers see the
16 name Backyard Grill and that's important to them, because
17 it's no more important than this fictitious made-up brand
18 name.

19 Based on those results, someone like me would
20 conclude that the brand name Backyard Grill is not causing
21 consumers to be more likely to purchase these products and I
22 would not interpret that to suggest that the brand name is
23 important to a significant number of consumers.

24 Q. So is it fair to say from your survey that you
25 would predict that Walmart could have used a name as bland as

1 Barbecue Grill and it would have sold just as many grills as
2 it did Backyard Grill?

3 A. The type of results would suggest that, sure.

4 Q. Were you in the courtroom yesterday when Mr. Ortiz
5 testified?

6 A. I was.

7 Q. Did you hear him say that when Walmart started
8 using the name Expert Grill, it actually sold as many or more
9 grills and grilling accessories as it had sold with Backyard
10 Grill?

11 A. I heard that, yes.

12 Q. Is that consistent with what you would have
13 predicted based on your survey?

14 A. Yes. I mean, these results certainly suggest that
15 Backyard Grill is not causing consumers to be more likely to
16 want to purchase these products, so a change in the brand
17 name would potentially not have caused any decrease in sales
18 and, as you say, might have increased the sales.

19 Q. Did you hear Mr. Ortiz testify there was a period
20 where Walmart sold these products with the same packaging but
21 just no trademark on it?

22 A. Yes, I understood that.

23 Q. And he testified that, again, the sales didn't
24 change. Is that consistent with the results that you would
25 have expected based on the survey that you did?

1 A. Yes, that would be consistent as well.

2 Q. Now, this table refers to the data for the
3 four-burner gas grill in the national survey that you did,
4 correct?

5 A. Yes. This table is just one of the tables.

6 Q. Were the results, generally speaking, that you got
7 here consistent with the results that you got across all
8 products both in the regional survey and the national survey?

9 A. Yes, that's exactly right. Probably don't remember
10 all ten tables or all eight tables, but yes, each of the
11 tables like this showed pretty much the same results, that
12 there was not much difference. The brand was always
13 relatively low, and there was hardly any difference between
14 the brand in the test and the brand in the control, so the
15 results were fairly similar across all the conditions.

16 Q. That testimony is already in the record, we don't
17 need to belabor it, but let me ask you based on all that,
18 what conclusions would you draw about the power of the term
19 Backyard Grill to actually cause consumers to purchase these
20 products?

21 A. Well, these results would be suggestive or
22 indicative of the fact that the brand Backyard Grill is not
23 causing consumers to be more likely to purchase these
24 products.

25 MR. HOSP: Nothing further, your Honor.

1 THE COURT: Any cross?

2 MR. SHAW: Yes, your Honor. Thank you. A few
3 questions.

4 **CROSS-EXAMINATION**

5 BY MR. SHAW:

6 Q. Dr. Van Liere, you understand in this case, don't
7 you, that Walmart is arguing that it received no benefit from
8 using the Backyard Grill brand. You understand that, right?

9 A. I'm not a lawyer, so I don't know if there's a
10 legal consequence to that. I understand that I was asked to
11 measure whether the Backyard Grill was causing consumers to
12 be more likely to purchase the product.

13 Q. Mr. Van Liere, you just testified that you heard
14 Mr. Ortiz testify, correct?

15 A. Yes. I heard his testimony yesterday, sure.

16 Q. And you agreed with Walmart's counsel that you
17 heard Mr. Ortiz' testimony and that it was consistent with
18 what you would have predicted to be the finding from your
19 research. You just testified to that, right?

20 A. Just to be --

21 Q. Right?

22 A. -- to be careful, I was only testifying that I
23 agreed that the sales results that he discussed would be
24 consistent with the kind of study I did.

25 Q. So is it your position, based on what you've heard

1 today and what Walmart's attorneys have told you, that you
2 understand that Walmart is trying to convince this jury that
3 the Backyard Grill brand had no value, that Walmart received
4 no benefit from using that brand? You understand that to be
5 Walmart's position, correct?

6 A. I don't want to offer an opinion about the legal
7 interpretation of what's at issue here.

8 Q. I'm not asking you for your opinion. I'm asking
9 you for your understanding, sir. You understand that to be
10 Walmart's position; yes or no?

11 A. Well, I just understand that I was asked to measure
12 the degree to which the Backyard Grill brand was causing
13 consumers to be more likely to purchase the products. That's
14 what I understood my assignment here to be.

15 Q. Okay. But as you sit here today, do you understand
16 that to be Walmart's position or not, or do you not have an
17 understanding one way or the other?

18 A. I would say I don't have a specific understanding
19 one way or another as you've asked the question.

20 Q. You're not here then to offer an opinion in this
21 case regarding the value of The Backyard brand to Walmart,
22 are you?

23 A. That's correct.

24 Q. You cannot offer any assessment of the value of the
25 brand to Walmart, can you?

1 A. Well, the kind of study I did might go into an
2 analysis related to the value, but no, I'm not here
3 specifically to offer some opinion about the value.

4 Q. So it's fair to say, then, you cannot offer a
5 specific assessment of the value of the brand to Walmart,
6 true?

7 A. Yes. I was not asked to estimate the value of the
8 brand to Walmart.

9 Q. And you cannot offer any opinion in this case
10 regarding the relative value of The Backyard grill brand as
11 it relates to any benefit that Walmart would have received
12 from using that brand, can you?

13 A. As you've asked the question, I don't understand
14 that to be my assignment, no.

15 Q. One last question. You didn't conduct a study to
16 measure the relative importance of The Backyard brand that
17 Variety owns, did you?

18 A. No, I was not asked to study the Variety brand. I
19 was simply asked to measure the extent to which the brand
20 Backyard Grill caused consumers to be more likely to buy
21 Walmart's branded grill products.

22 MR. SHAW: No more questions, your Honor. Thank
23 you.

24 THE COURT: Any redirect?

25 MR. HOSP: Nothing further, your Honor.

1 THE COURT: Thank you. You can step down.

2 (Witness Excused)

3 THE COURT: Next witness.

4 MR. PUZELLA: Your Honor, Walmart calls Mr. Graham
5 Rogers.

6 **GRAHAM ROGERS**

7 having been duly sworn, testified as follows:

8 THE WITNESS: I do.

9 MR. PUZELLA: May I approach, your Honor?

10 (Attorney Puzella providing exhibit binder to the witness)

11 **DIRECT EXAMINATION**

12 BY MR. PUZELLA:

13 Q. Good morning.

14 A. Good morning.

15 Q. Could you introduce yourself to the jury, please?

16 A. Yes. My name is Graham Rogers.

17 Q. Mr. Rogers, what do you do?

18 A. So I have more than 20 years of experience in
19 valuing intellectual property and determining monetary
20 damages in the forms of lost profits, reasonable royalties,
21 other types of damages claimed and intellectual property
22 matters which would include trademarks and patents and
23 copyrights. I also have experience in pricing of
24 intellectual property, and I'm experienced in analyzing
25 financial, economic and accounting information to assist in

1 determining what the monetary damages would be in litigation
2 matters such as this.

3 Q. Tell us about your educational background.

4 A. So I graduated in 1987 with a Bachelor of Science
5 in physical science from the United States Naval Academy. I
6 then graduated in 1996 with a Master's in business
7 administration with an emphasis in finance and economics from
8 the University of Chicago.

9 Q. Tell us a little bit about your work experience,
10 the 20 years you just described.

11 A. As of right now, I have my own firm. My own firm
12 is called Rogers Damages and Valuation Services headquartered
13 at Charlotte, North Carolina. But before that I had seven
14 years as a Naval officer. I spent seven years as an officer
15 in the military and after graduating from business school,
16 the rest of my work has been in the area of litigation
17 support and the valuation of intellectual property.

18 So that's about I think more than 22 years' worth
19 of work in the areas that I described earlier, and those
20 firms would have been primarily the Big Four accounting firms
21 or boutique firms specializing in litigation support
22 services.

23 Q. What's a Big Four accounting firm?

24 A. Big Four accounting firms are firms -- the names of
25 the firms are -- see if I can get them right. KPMG, PwC,

1 Deloitte and -- I'm drawing a blank on the other one.

2 Q. That's all right. Do you hold any professional
3 certifications?

4 A. Yes. I am an ASA, which stands for accredited
5 senior appraiser, in business valuation from the American
6 Society of Appraisers. I am also a CVS, certified valuation
7 specialist, from the Royal Institute of Chartered Surveyors,
8 which is an international-based organization. And I'm also a
9 CLP, certified licensing professional, from the Licensing
10 Executives Society. And with regards to the CLP, I'm also
11 certified as a trainer, so I actually train people in how to
12 value and price intellectual property.

13 Q. And have you prepared a resume that lists your
14 academic and work experience?

15 A. Yes.

16 Q. Could you turn to Exhibit D-148 in the binder.

17 A. (Witness complying).

18 Q. Is this your professional resume, sir?

19 A. Yes. This is -- yes.

20 MR. PUZELLA: I offer it, your Honor.

21 THE COURT: It's received.

22 **(Defendant's Exhibit No. D-148 received into evidence)**

23 Q. (By Mr. Puzella) Approximately how many times have
24 you acted in a case to address the issues such as those in
25 this case?

1 A. I've been hired to look at intellectual property
2 matters probably 80 or 90 times. Of the --

3 Q. What types of cases are those?

4 A. I'm sorry.

5 Q. What types of cases are those?

6 A. Those would be patents, trademark, copyrights,
7 trade secrets. Could be a combination of the above. I refer
8 to them as complex commercial litigation cases. So the CV
9 covers my complex commercial litigation cases and of the 80
10 or 90, I think probably 20 or so are just trademark cases.

11 Q. And are those cases identified in your resume?

12 A. Yes, they are.

13 Q. And are there more cases since the time you
14 prepared your resume?

15 A. Yes. I think there's about 20 additional cases and
16 of those 20, I think there's nine are trademark matters.

17 Q. In those trademark matters have you addressed the
18 issues that you're going to address today with this jury
19 concerning our issues?

20 A. Definitely the issue of monetary damages. Each
21 case is fact specific, so each case might have different
22 types of damages that the parties seek, but all of them -- in
23 all the cases I'd be looking at monetary damages.

24 Q. And generally speaking, do you in your practice
25 work only for defendants and not for plaintiffs, or do you

1 work for both?

2 A. I work for both. And over the duration of my
3 career, I think it's about 50/50 as far as which side. It
4 ebbs and flows depending on the year and how much I might do
5 for plaintiff versus how much I do for defendant, but I think
6 over the time period it would be about even.

7 MR. PUZELLA: Your Honor, I offer Mr. Rogers as an
8 expert.

9 THE COURT: Do you have any objection?

10 MR. ADAMS: Not now.

11 THE COURT: All right. He'll be -- (brief pause).
12 See, normally witnesses can't express an opinion if it's
13 something the jury can figure out on their own. If you don't
14 need an expert, then you just -- it's for you to decide. And
15 the Court has to decide whether the witness has sufficient
16 education, experience, background, things of that sort in
17 order to provide you with an understanding or with an
18 evidentiary basis in order to do your job.

19 I'll allow him to be an expert subject to further
20 review of the Court.

21 MR. PUZELLA: Thank you, your Honor.

22 Q. (By Mr. Puzella) Mr. Rogers, have you seen any
23 evidence that Variety has suffered any harm due to Walmart's
24 conduct in this case?

25 A. No, I have not seen any evidence to support that.

1 Q. And have you examined Variety's sales of its grills
2 and grilling accessories during the relevant period of time?

3 A. Yes, I have.

4 Q. Can you turn to Exhibit DDX-15 in the exhibit
5 binder in front of you?

6 A. I'm sorry, what number?

7 Q. What is DDX-15?

8 A. DDX-15 is a summary that I prepared to graph
9 Variety's sales over the time period.

10 Q. And is this a document you prepared yourself?

11 A. Yes.

12 Q. How did you go about preparing it?

13 A. Well, I was provided information with regards to
14 Variety sales over the time period as part of the discovery
15 in this case. So this is basically a summary of that
16 information that was provided to me.

17 Q. What does DDX-15 tell you?

18 A. Well, it tells me that over the time period the
19 sales have gone up.

20 Q. Mr. Rogers, do you understand what types of
21 monetary remedies Variety is claiming in this case?

22 A. Yes, I understand that they're claiming Walmart's
23 profits and a reasonable royalty on Walmart's revenue.

24 Q. And have you arrived at an opinion regarding
25 Variety's demand for Walmart's profits and a royalty in this

1 case?

2 A. Yes.

3 Q. And what materials did you review to arrive at that
4 opinion?

5 A. So I reviewed the information that was provided to
6 me through discovery, which would be sales information from
7 Variety, store locations from Variety, which would include
8 the location and address of their stores.

9 From Walmart's, I've received a variety of
10 documents and they would include spreadsheets that included
11 sales -- revenue information as far as sales, cost
12 information, documents that also identified Walmart's stores
13 by store number and the corresponding addresses of those
14 stores. I reviewed the survey that Dr. Van Liere submitted
15 in this case, and I also have been listening to the testimony
16 provided by the witnesses, so I've listened to all the
17 testimony that's -- and I've included that as well.

18 Q. Before we talk about your opinion, I would like to
19 ask you whether you performed a valuation of Variety's
20 trademark in this case.

21 A. No, I did not do a valuation.

22 Q. Why not?

23 A. Well, I wasn't asked to do that. And the types of
24 damages that they're seeking, profits would not necessarily
25 require you to do a valuation. With regards to a valuation,

1 they would be useful if you were trying to identify
2 degradation in value of a trademark. They would be useful in
3 determining potentially the relative strength of the parties
4 involved. But without -- I've heard lots of comments here
5 about the trademark has value. There's really no way to
6 determine whether or not Variety's trademark has value
7 without conducting an actual valuation.

8 Q. Did Professor Poindexter, Variety's expert, did he
9 perform a valuation of Variety's own trademark in his
10 analysis?

11 A. No.

12 Q. Mr. Rogers, what is your expert opinion in this
13 case concerning a reasonable royalty and disgorgement of
14 profits?

15 MR. ADAMS: Objection, your Honor. No foundation.

16 THE COURT: Overruled.

17 A. So with respect to profits, based on the
18 information that I've had -- I've heard, the analysis that
19 I've heard and the testimony I've heard, the review of Dr.
20 Van Liere's survey, I see no evidence to support that The
21 Backyard trademark caused consumers to purchase the products
22 in question. So if the products in question weren't being
23 driven by The Backyard trademark, then the attributable value
24 of the trademark to the profits would be zero. In this case
25 the value attributable to the trademark would be zero with

1 regard to profits.

2 With regards to royalties, it's my opinion that
3 royalties would not be an appropriate damages remedy in this
4 case. If the Court were to award royalties, I see no
5 evidence at this point to justify any rate, let alone a rate
6 of 5 or 10 percent.

7 Q. Let's work backwards from that opinion and talk
8 first about your opinion concerning profits. How did you go
9 about arriving at an opinion? What did you do?

10 A. Well, the first thing I wanted to do was find out
11 where the parties competed or overlapped. That was important
12 to me because I needed to find out where the parties competed
13 for sales. In those areas where the parties did not compete,
14 there's no way that those sales that Walmart made would have
15 been attributed to Variety's trademark.

16 So the first thing I did was I did an analysis
17 looking at it on a state-by-state level, and I identified the
18 16 states and DC. And then secondly I did an analysis on a
19 more granular level comparing it on a store-by-store basis.

20 Q. What did you do next?

21 A. Well, the next thing I did, again using the
22 documents, the sales information, the locations of both
23 Variety's and Walmart's stores, I identified the fact that
24 there were 16 states plus DC. So I looked at Walmart's sales
25 information, the cost information. I was able to filter and

1 identify only those sales that showed up in the 16 states and
2 DC.

3 Q. And did you have a third and final step?

4 A. So once I identified the sales revenue and the
5 costs, that allowed me to identify the profits, of which I
6 also took a look at what other incremental profits might be
7 included in that to get to a level of incremental
8 profitability. Once I identified the incremental profit, the
9 last step was looking at how much of those profits were being
10 driven by The Backyard trademark in question here.

11 Q. Mr. Rogers, have you prepared a Demonstrative that
12 illustrates the calculations that you performed?

13 A. Yes.

14 Q. Could you look at DDX-8 in your binder. What is
15 DDX-8?

16 A. DDX-8 is the simple calculation to arrive at a
17 number of incremental profits. On the left-hand side it's
18 simply sales revenue minus the cost of goods sold to get to a
19 gross profit level. And on the right-hand side you have
20 gross profit less your variable costs, any identifiable
21 variable costs that have to be subtracted from gross profit
22 to end up with incremental profit.

23 Q. Is this the calculations that you performed?

24 A. Yes.

25 Q. And to your understanding as relates to the

1 left-hand side, sales revenue minus cost of goods sold and
2 gross profit, Professor Poindexter agrees with you as to how
3 to calculate gross profit?

4 A. Yes.

5 Q. And to your understanding on the right-hand side,
6 Professor Poindexter agrees that variable costs should be
7 deducted, correct?

8 A. My understanding is he agrees that -- with the idea
9 that variable costs should be deducted. My understanding is
10 he doesn't agree with how I've identified the variable costs.

11 Q. And do you understand that Professor Poindexter
12 agrees that ultimately it's incremental or contribution
13 profit that the jury should consider when it's looking at
14 whether the number or profit to potentially disgorge?

15 A. Yes.

16 Q. Let's talk about your calculations with respect to
17 the 16 states and DC that you just described. What did you
18 do to calculate Walmart's sales revenue for those states?

19 A. As I was describing earlier, I received
20 spreadsheets from Walmart -- as you can imagine, they were
21 very voluminous -- with the number of sales. I think the
22 database that I developed was more than 5 million rows' worth
23 of data. But using that sales and cost information that I
24 was able to create, as I discussed earlier, I also had a
25 separate document that identified Walmart's stores by their

1 store locations. So by combining these two together, I was
2 able to filter the information and find and identify only the
3 sales and costs associated with sales in the 16 states plus
4 DC.

5 Q. Have you conducted this kind of state-by-state or
6 market area analysis like this in other cases?

7 A. Yes. It would be common in a patent infringement
8 case with regards to a lost profit claim to see whether or
9 not the parties overlapped and whether or not they would have
10 been able to make a sale from a lost sale.

11 Q. Did you ultimately calculate sales revenue based on
12 the 16 states and then calculate various numbers as you just
13 described based off that --

14 A. Yes.

15 Q. -- revenue figure?

16 A. Yes.

17 Q. Did you prepare a Demonstrative that illustrates
18 your calculations?

19 A. I did.

20 Q. Could you turn to Exhibit DDX-10 in your binder in
21 front of you.

22 A. (Witness complying).

23 Q. Could you tell the jury what DDX-10 is?

24 A. So DDX-10 talks about the -- it summarizes the
25 information that I analyzed and -- in identifying the sales

1 revenue and the costs to get to a gross profit and also
2 summarizes the information I identified from variable costs
3 and reduced -- and showing the reduction of those variable
4 costs from the gross profit to end up at an incremental
5 profit figure.

6 Q. Did you prepare that yourself?

7 A. I did.

8 Q. Can you walk the jury through this exhibit and
9 explain to them what the various figures represent and how
10 you calculated them beginning on the left?

11 A. Sure. First of all, this is set up very similar to
12 that last simple slide that I showed you, which was on the
13 left-hand side. You had sales minus your costs of goods sold
14 to get to the gross profit. In this case, again, I'm only
15 looking at the 16 states plus DC sales with regards to
16 Walmart. And by making that -- identifying that filter, I
17 was able to identify that the sales revenue which shows up in
18 Box 1 there is \$395 million -- \$395,316,314.71. And the next
19 box down is the identification of the cost of goods sold
20 associated with those sales in those 16 states and DC, Box 2,
21 and that number is 285,494,983.92.

22 Q. Again, Professor Poindexter agrees with you it's
23 proper for the jury to deduct cost of goods sold from
24 revenue, correct?

25 A. Yes.

1 Q. Okay.

2 A. So to get to gross profit, Box 3, as I described
3 earlier, it's simply the sales revenue less cost of goods
4 sold. In this case it's 109 million -- 109,821,330.79.

5 Q. What did you do next?

6 A. So as I described earlier, the next thing I wanted
7 to do was identify if there were any variable components that
8 need to be considered and needed to be reduced or subtracted
9 from their gross profit to end up with an incremental profit
10 figure. So when I analyzed and looked at the information, I
11 identified three costs that need to be identified as far as
12 being variable. The first one was shipping costs, the next
13 was the variable components of SG&A, and the third component
14 was incremental taxes.

15 Q. Let's take the additional costs one at a time. Why
16 in your opinion is it appropriate to deduct incremental
17 shipping costs shown in 4A?

18 A. Well, the gross profit -- well, the cost of goods
19 sold identifies the costs associated with getting the product
20 to a Walmart distribution center. It does not cover the
21 cost -- shipping cost to get the product from the
22 distribution center to a store. Or the cost of getting the
23 product from a distribution center to an end customer. So
24 those shipping costs that show up in 4A are identifying those
25 costs to get the product from a distribution center to either

1 a store or from a distribution center to a customer.

2 Q. And are those variable costs or fixed costs?

3 A. Well, they're variable because they would not have
4 been incurred unless the product was actually sold.

5 Q. And again, Professor Poindexter agrees that
6 variable costs should be deducted to arrive at incremental
7 profit, correct?

8 A. Yes.

9 Q. Can you describe the next box, 4B, variable SG&A.
10 What's that?

11 A. Before we do that, can I do a quick explanation of
12 how I came up with the shipping costs?

13 Q. Of course.

14 A. With the shipping costs there's -- companies of any
15 size report shipping costs and using something they call a
16 freight factor. The freight factor contrasts the shipping
17 cost as a comparison or as a percentage of sales revenue. So
18 I asked Walmart for freight factors with regards to the
19 shipping costs to get the products from the distribution
20 center to either the store or to the end customer, and I was
21 provided two separate freight factors. First one was from
22 Walmart stores, which covered the shipping from a
23 distribution center to a store. And the second one was from
24 dot-com, so it included the Internet sales to identify those
25 costs to ship a product from a distribution center to an end

1 customer, to a home. And taking those two freight factors
2 which are percentages, I was able to apply those percentages
3 to the sales revenue that showed up in Box 1 and identified
4 the incremental shipping costs at 5,273,026.85.

5 Q. Could you walk us through how you calculated SG&A,
6 perhaps beginning with what it is?

7 A. So SG&A is selling, general and administration
8 costs. Those are costs -- I think you heard Dr. Poindexter
9 say yesterday those are costs that might include store
10 salaries, distribution center salaries, payroll taxes,
11 utilities, insurance, advertising, other types of overhead
12 costs, and to calculate SG&A, the variable portions of SG&A,
13 and because SG&A is made up of both fixed and variable
14 components.

15 So what I was doing is identifying only the
16 variable component of the SG&A. To do that, there are two
17 types of methods you can use to calculate the variable
18 components. The first one that Dr. Poindexter talked about
19 yesterday was an account-by-account basis and what he
20 described as going and sitting and -- with a company
21 president, controller or whatever, and going through each
22 individual detailed line item, pulling invoices, pulling
23 receipts, finding out how much of it was -- how much of each
24 individual cost was variable versus how much is fixed. A
25 company of any size, like a company the size of Walmart, it

1 would be impossible to do that task.

2 So the other way to identify the variable
3 components of SG&A is something referred to as a regression
4 analysis. It's a statistical method used to estimate the
5 relationship between two variables and to report that
6 relationship. So I used the regression method.

7 Q. And generally speaking, how did you do the
8 calculations of the regression analysis? What did you do?

9 A. So regression analysis, to do that those -- to do a
10 regression -- the functions of that are actually built into
11 most spreadsheet programs like Microsoft Excel. I use
12 Microsoft Excel. I used the regression package associated
13 with Microsoft Excel and was able to run the regression and
14 end up with a determination that 18.22 percent of revenues is
15 a good identifier of the variable components of SG&A.

16 Q. And how did you arrive at the figure in Box 4B?

17 A. So like I said, it's 18.22 percent of revenue, so
18 again, I was able to go back to Box 1, the revenue, multiply
19 it by the 18.22 percent as shown in the regression, and that
20 number shows up in 4B, which is \$72,026,632.54.

21 Q. Now, the shipping costs and the -- well, strike
22 that. You've identified 4B as variable SG&A. A moment ago I
23 believe you testified SG&A can be both a fixed cost and a
24 variable cost, correct?

25 A. There's components of it. Some will be fixed, some

1 will be variable.

2 Q. Could you explain to the jury why in your opinion
3 it's appropriate to deduct the variable portion? What does
4 the variable portion mean?

5 A. Well, again, the -- I'm trying to get down to the
6 incremental profit, so I'm trying to get down to what's the
7 profit associated with additional sales of products. So to
8 do that I need to identify all of the incremental components
9 of costs other than just cost of goods sold, and that's why
10 I've identified these three different types of costs.

11 Q. What makes a cost variable? Could you explain
12 that?

13 A. The fact that they vary. The fact that they change
14 with the additional sales.

15 Q. So with an additional sale, you would incur an
16 additional cost?

17 A. Yes.

18 Q. What did you do next?

19 A. The final category of variable costs that I
20 identified were incremental taxes. So incremental taxes vary
21 because in this case we're looking at trademark -- looking at
22 sales of Walmart that Walmart actually made, so they actually
23 made these sales. They generated revenue. They generated
24 profit. And since they generated profit, they also paid
25 taxes on those. So since they paid taxes on those, those

1 become a variable cost, and so I identified the incremental
2 cost -- incremental portions of the taxes based on the amount
3 of sales that were identified.

4 Q. And what was the figure that you came up with?

5 A. So Box 4C, I came up with 10,372,127.09.

6 Q. Once you calculated 4A, 4B and 4C, what did you do
7 next?

8 A. As the slide shows, I literally added the boxes
9 together to get the number shown up in Box 4, and then I
10 subtracted that from the gross profit and you end up with
11 your incremental profit in Box 5, which is \$22,149,544.31.

12 Q. And what does the \$22 million in Box 5 represent?

13 A. Well, that represents the incremental profit, in
14 other words, the profit that would be potentially available
15 to -- for disgorgement.

16 Q. For the 16 states that you looked at in this
17 analysis?

18 A. For the 16 states plus DC, yes.

19 Q. Have you learned anything else that affects your
20 profit calculations?

21 A. Yes. After I did the analysis, I understood or I
22 found out that with regards to the Internet sales, the
23 dot-com sales, there's a shipping revenue component that I
24 was made aware of after the fact, and so to be accurate I
25 wanted to go -- I went back and adjusted the numbers to

1 incorporate the shipping revenue associated with the dot-com
2 sales. So that increases the incremental profit by
3 \$389,293.68, so the adjusted incremental profit is
4 22,538,837.99.

5 MR. PUZELLA: Your Honor, I offer DDX-10.

6 THE COURT: It will be received.

7 **(Defendant's Exhibit No. DDX-10 received into evidence)**

8 Q. (By Mr. Puzella) Now, you mentioned that you also
9 calculated Walmart's revenue and costs for sales at a
10 different geographic location. Could you tell us about that?

11 A. Sure. Again, the first thing I did was I looked at
12 on a state-by-state level, but the more I looked at the data,
13 the more I started to realize there are areas within a state
14 where the parties didn't overlap. Therefore, it didn't
15 compete for the sales. Again, with the idea I'm trying to
16 identify those sales where any of Walmart's profits would be
17 associated with Variety's trademark, I wanted to find out
18 exactly where the parties competed and by doing an analysis
19 on a store-by-store level, I was able to, I think, get closer
20 to that determination.

21 Q. Could you -- have you prepared any demonstratives
22 that illustrate this store-by-store analysis that you
23 conducted?

24 A. Yes.

25 Q. Could you turn to Exhibit DDX-13 in your binder,

1 please.

2 A. (Witness complying).

3 Q. Are these the exhibits you prepared?

4 A. Yes.

5 Q. Could you walk us through --

6 A. Sure. So these are just examples of a couple
7 different states. So the first one is the State of Florida,
8 which I'm sure we all recognize. The little black dots
9 represent a Variety store location with a radius built around
10 it, a mile radius built around it.

11 The next one overlays that with all the Walmart
12 store locations. So as you can see, there are a number of
13 Walmart stores that are outside of a footprint of a Variety
14 store, with the Variety stores being mainly in the northeast
15 around Jacksonville and the northwest, and also in and around
16 the Orlando area. There are a number of stores in the Tampa
17 Bay or Miami or Fort Lauderdale area that are hours away from
18 the closest Variety store.

19 I also looked at West Virginia as an example. In
20 West Virginia Variety has two stores and they're right in the
21 bottom portion of the state. The next slide overlays it with
22 Walmart locations, and there's only one store in West
23 Virginia that falls within that Variety footprint. The rest
24 of the stores in West Virginia fall outside that footprint.
25 Again, many hours from the closest Variety store. So I

1 thought looking at it store-by-store level was more accurate
2 to determine where the parties competed.

3 Q. Have you conducted a more detailed geographic
4 overlap analysis such as you just described during your
5 career?

6 A. Yes. It's done frequently in patent infringement
7 cases looking at where sales forces might overlap. If one
8 company's sales force overlaps with another company's sales
9 force, they're likely to have been able to have made a sale
10 or compete for the same sale.

11 Q. How did you arrive at a distance to consider from a
12 Variety store to conduct your analysis?

13 A. Well, I knew there would be some distance, but I
14 didn't know what that distance was, and so I started out by
15 doing some independent research. And the independent
16 research that I did, I identified a survey that was off the
17 Internet that identified how far retail customers were
18 willing to travel to buy products from a retail store, and
19 that survey showed it was between 12 and 23 minutes. So 12
20 and 23 minutes. Depending on whether you're doing highway
21 driving or local town driving, that can vary a little bit.
22 So to be conservative, I picked a number of 25 miles. So the
23 radius that I picked was 25 miles.

24 Q. And did you consider any other things in your
25 analysis of what to use as a radius in this geographic

1 analysis?

2 A. Yes. The first thing I did was I looked at how far
3 Variety placed its stores, and in a number of locations
4 Variety was within 5 miles of their own stores. So that told
5 me that Variety thought that their penetration was half of
6 that or about two-and-a-half miles. I also had conversations
7 with Walmart personnel and I talked to somebody in their data
8 analytics group and asked them if they had information on
9 their customers and how far their customers were willing to
10 travel, and they told me they would expect their customers to
11 travel between 5 to 7 miles. So both those data points told
12 me that the 25-mile radius that I identified for the survey
13 was very conservative in Variety's favor.

14 Q. So once you identified the 25-mile radius, what
15 happened? Did you -- how did you use that information? What
16 did you do next?

17 A. Well, similar to the calculation I did before in
18 the 16 states and DC level, since I had the information on
19 store locations by address, I was able to use mapping
20 software and identify that there are 1,166 stores within a
21 25-mile radius of a Variety store.

22 Q. And once you identified the 1,166 Walmart stores
23 that are within 25 miles of a Variety store, what did you do
24 with that information?

25 A. Put together the same analysis that I did before.

1 So I was able to identify the sales and the costs information
2 using the same sales and cost information I used before and
3 filtered it only for the 1,166 stores and created an
4 incremental profit figure based on that analysis.

5 Q. Did you prepare an exhibit similar to the one we
6 saw previously that illustrates your calculations?

7 A. Yes, I did.

8 Q. Could you turn to Exhibit DDX-11, please. Is
9 DDX-11 the calculation that you prepared based on your
10 25-mile radius analysis?

11 A. Yes, it is.

12 Q. And did you perform these calculations yourself?

13 A. I did.

14 Q. You don't need to walk us through it in great
15 detail here because we just did it with the other slide, but
16 could you just briefly walk the jury through the calculations
17 that you performed as shown in the slide?

18 A. Sure. On the left-hand side set up the same way to
19 get to gross profit, you would take Box 1 minus Box 2. And
20 then on the right-hand side the variable components of -- the
21 variable expenses and additional costs I identified for
22 shipping costs, variable SG&A and incremental taxes were
23 calculated the same way.

24 When you subtract the incremental costs, variable
25 costs from gross profit, you end up with incremental profit

1 of \$12,939,945.61. And then I also had to take a look and
2 see if what -- the same effect with regards to what the
3 dot-com shipping revenue is so it had the same effect over
4 the 939. Adjusted incremental profit is profit -- adjusted
5 incremental profit \$13,329,239.30.

6 MR. PUZELLA: Your Honor, I offer DDX-11.

7 THE COURT: You offer that?

8 MR. PUZELLA: I offer DDX-11.

9 THE COURT: Received.

10 **(Defendant's Exhibit No. DDX-11 received into evidence)**

11 Q. (By Mr. Puzella) Mr. Rogers, what does the
12 \$13 million figure there represent?

13 A. Again, it represents the incremental profit
14 associated with sales of products by Walmart of the 1,166
15 stores and it's the incremental profit available for
16 disgorgement.

17 Q. Does Dr. Poindexter agree with you that the jury's
18 consideration in profit should be limited to the sales by the
19 1,166 Walmart stores within 25 miles of a Variety store?

20 A. No. I believe he would say it should be within all
21 50 states.

22 Q. And do you agree with him on that?

23 A. No, I don't.

24 Q. Nonetheless, have you prepared a summary that
25 illustrates the calculations of Walmart's revenue and costs

1 for all 50 states?

2 A. Yes, I have.

3 Q. And did you prepare it exactly as you have the
4 prior two slides?

5 A. Yes.

6 Q. Could you turn to DDX-9 in your binder, please.

7 A. I'm sorry, did you say 9?

8 Q. 9.

9 A. Okay.

10 Q. What is DDX-9?

11 A. DDX-9 is the summary that I put together based on
12 the analysis of looking at the sales and costs information to
13 end up with incremental profit associated with all U.S.
14 geographies.

15 Q. So for all 50 states?

16 A. Yes.

17 Q. This is Dr. Poindexter's position?

18 A. Well, his number is slightly different because the
19 number that he has actually is about \$109,000 more, because
20 in that number there are sales from the dot-com into 41
21 international countries. So I excluded the sales into the 41
22 international countries to look at only U.S. geographies, so
23 that's what this number is. So my number on the revenue line
24 will be about \$109,000 lower than Dr. Poindexter's.

25 Q. Because you took out these foreign sales?

1 A. Yes.

2 Q. So again, without walking us through in great
3 detail, could you just illustrate what the jury is looking at
4 here?

5 A. Sure. Again, it's the same calculation. On the
6 left it's sales revenue minus cost of goods sold to end up
7 with a gross profit. On the right-hand side I'm looking at
8 identifying the incremental costs the same way I've done in
9 the other analysis. When I subtract out -- add up the
10 variable costs and subtract them from gross profit, I end up
11 with incremental profit figure in Box 5 of 48,206,179.59.

12 And then the last step, again, is looking at what
13 the effect of the sales revenue from the dot-com that I've
14 explained earlier, and the effect of that when you look at it
15 on a US geography basis is \$930,241.51. So the adjusted
16 incremental profit for the sales -- Walmart's sales for the
17 U.S. geographies would be \$49,136,421.10.

18 Q. And again, do you think that's the correct amount
19 of profits for the jury to consider?

20 A. No, I think it should be the number based on the
21 25-mile radius where the parties actually compete for sales.

22 Q. Do you have an opinion on whether it's appropriate
23 to award any of Walmart's profits?

24 A. Yes.

25 Q. And what is your opinion?

1 A. Well, my opinion is based on information that I was
2 provided from Dr. Van Liere's survey, which concluded that
3 the name on the grill did not cause the sales of Walmart
4 profit -- or Walmart products. And it also is based on
5 testimony that I've heard with regards to -- I think it was
6 Ms. Dineen talked about consumer research that was done
7 before they put a name on the product, and that consumer
8 research showed that the name was not important to the
9 consumers unless it was a major brand name like Weber. And
10 then I also heard testimony from Mr. Ortiz that talked about
11 how they sold product without a name on it at all and the
12 sales stayed the same.

13 So those three pieces of information led me to
14 conclude that the profits generated by Walmart in the sales
15 of their products were driven by things other than the name.
16 Price, features, things like that. And so since they were
17 driven by things other than the name, the amount of profit
18 that was directly attributable to the name, no matter what
19 the level of profits that you're looking at, would be zero.

20 Q. Have you conducted an analysis like that and
21 considered facts such as those in other cases where you've
22 been -- you've acted as an expert?

23 A. Yes. In each one of the trademark matters that I
24 looked at, how much of the profit is attributable to the
25 trademark has to be considered.

1 Q. And does your experience in doing IP value work
2 have relationships to that opinion?

3 A. Yes.

4 Q. How so?

5 A. Well, in doing valuation of IP, when you get down
6 to an incremental profit figure when you're -- a valuation of
7 IP might include different forms of IP. Might include
8 copyright, a patent and trademark. It also will include all
9 the other manufacturing benefits the company brings. And so
10 the last thing in valuing IP, specifically valuing a
11 trademark in IP, is apportioning the value left over to the
12 different assets used to create that profit.

13 Q. And you engage in that exercise routinely in your
14 professional life, correct?

15 A. All the time, yes.

16 Q. Did Professor Poindexter engage in that analysis?

17 A. He did not.

18 Q. Mr. Rogers, what's your expert opinion in this case
19 with respect to whether Variety should receive any of
20 Walmart's profits?

21 A. My opinion is that based on the information
22 provided by Dr. Kent Van Liere, the testimony that I've heard
23 in this case, that the name does not cause the sales. And so
24 if the name does not cause the sales, The Backyard
25 trademark -- or the profits generated from those sales are

1 not attributable to the trademark, and so therefore, again,
2 no matter what level of profits I'm looking at, none of those
3 would be attributable to the trademark.

4 Q. Let's discuss Variety's demand for an award of
5 royalty in this case. What's a royalty?

6 A. So a royalty -- I think we've heard testimony on
7 this yesterday. A royalty would be a fee received when a
8 licensor and licensee enter into an agreement and they agree
9 to pay -- one party agrees to pay another party for the use
10 of their -- in this case a trademark. It could be a patent,
11 a trademark, it could be a copyright, a variety of things.

12 Q. What's your understanding regarding Variety's
13 request for royalty?

14 A. My understanding is they're claiming either
15 5 percent or 10 percent of Walmart's sales revenue.

16 Q. And why do you say either 5 percent or 10 percent?

17 A. I heard two people testify yesterday. One I think
18 testified that it was 10 percent, Mr. Blackburn, and then I
19 heard Dr. Poindexter testify later in the day that his
20 numbers would support a number of around 5 percent. At least
21 5 percent I think is what he said.

22 Q. And have you formed an opinion as to whether it's
23 appropriate to award Variety a royalty at all?

24 A. Yes. It's my opinion that royalties in this case
25 would not be an appropriate measure of damages. And what I

1 mean by that is normally in a situation like this when you're
2 looking at royalties, you're looking at what's referred to as
3 a lost royalty. And a lost royalty would be generated when
4 there's a previous relationship that has been established
5 between the parties, so therefore -- and the parties may have
6 already been paying on that relationship.

7 And an example might be a local franchise. Think
8 about a Subway owner who owns a franchise, and for some
9 reason there's a falling-out between the franchisor and the
10 franchisee, yet the local store continues to use the sales
11 wrappers that say Subway on it or they continue to use the
12 signage from Subway after the agreement has kind of fallen
13 apart. And in that case there's a history associated with
14 what -- the franchise fees or royalties that were paid, and
15 so it's easy to calculate what those lost royalties would
16 have been based on the previous historical relationship of
17 the parties in question.

18 Q. Now, do the parties here have a prior licensing
19 history between them?

20 A. No.

21 Q. Has Variety ever licensed its Backyard trademark to
22 anyone?

23 A. Not that I'm aware of.

24 Q. Have the parties ever engaged in even negotiations
25 concerning licensing of The Backyard mark from Variety to

1 Walmart?

2 A. No.

3 Q. Does the absence of any license agreements between
4 Variety and Walmart or any other companies affect your
5 analysis?

6 A. Well, with regards to whether or not royalties are
7 appropriate, I think it does. Because like I said, in a lost
8 royalties situation, from my experience you're looking at
9 identifying those lost royalties that should have been paid
10 based on some historical facts associated to establish that a
11 royalty had been paid or was expected to be paid.

12 In this case I see no evidence of that, so I don't
13 think lost royalties would be an appropriate measure of
14 damages.

15 Q. Were you here during Dr. Poindexter's testimony?

16 A. Yes, I was.

17 Q. And what is your understanding concerning his
18 request for a royalty?

19 A. Well, like how he establishes a royalty rate?

20 Q. The percentage.

21 A. I'm sorry?

22 Q. The percentage.

23 A. I believe he said -- I think he said 5 percent, or
24 maybe at least 5 percent, and I believe he's basing that
25 on -- again, I think what he said was -- and I'm sure the

1 record will correct me if I'm wrong, but I think he said that
2 he would have expected the royalty rate to be 5 percent. And
3 then when he looked at the -- referred to as the Battersby
4 book, the Battersby book showed a corporate range within 4 to
5 6 percent, which met what his expectation was going to be
6 prior to entering the case, from the way I understood his
7 testimony. So that's -- that's how I understand he has
8 created the 5 percent royalty rate.

9 Q. And do you agree with the reasons he provided for
10 justifying his 5 percent royalty rate?

11 A. No.

12 MR. PUZELLA: May I approach, your Honor, supply
13 the witness with books?

14 THE COURT: Yes.

15 (Attorney Puzella providing books to the witness)

16 Q. (By Mr. Puzella) In your opinion is Professor
17 Poindexter's reliance on the Battersby book appropriate?

18 A. Not in and of itself, no.

19 Q. Could you explain that?

20 A. Well, again, if I understand what his analysis was,
21 was he looked at the tables associated with the Battersby
22 book. That's this book, if you all remember. It had the
23 tables associated, and it had tables -- we went through it
24 yesterday -- had tables with regard to celebrities and events
25 and other things. But he looked at the corporate area, which

1 is the area that I would look at in this case, because the
2 parties are both corporate parties in this case.

3 The problem that I have with just looking at this
4 book without doing any type of further analysis is there's no
5 way to determine what types of marks were incorporated or
6 included in developing the range of 4 to 6 percent. So
7 there's no way to make any kind of a comparison or determine
8 comparable act between Variety's mark and the marks that may
9 have ended up in the range of 4 to 6 percent. The detail of
10 those individual licenses are not available in the book.

11 Q. Do you recall yesterday that book was analogized to
12 an ADA or Kelley Blue Book that someone might look up car
13 prices in?

14 A. Yes.

15 Q. Do you agree that that book can be used in that
16 way?

17 A. Well, not necessarily, because in a Kelley Blue
18 Book, you wouldn't go to the Blue Book and say, I want to
19 sell a pickup truck and that's the only information you have.
20 You have to know whether or not it's a Ford or a Chevrolet,
21 what year it is, what the features are. You would have to do
22 comparability to identify the most appropriate -- in the case
23 of the Blue Book, the most appropriate pickup truck and
24 compare that to what you're actually trying to sell.

25 So in my opinion what Dr. Poindexter is doing is

1 he's taking his pickup truck and applying it to an overall
2 range of corporate rates of 4 to 6 percent and saying it's
3 analogous without doing any further analysis.

4 Q. So would it be fair to say looking at the book and
5 identifying the 4 to 6 percent range is just a first step in
6 any analysis?

7 A. Absolutely. It just helps to identify a potential
8 range. The problem, again, I talked about with identifying
9 the book as far as the potential range is I still can't do
10 level of comparability. What I would normally do in
11 developing a licensing rate would be looking at the databases
12 that are available online, what's referred to as
13 RoyaltySource.com and ktMINE.com, and those will provide me
14 information that may be the same information that's provided
15 in the book, but from that I'll be able to get the actual
16 parties and I'll be able to see the parties involved, and
17 I'll be able to compare the parties to see if they're both
18 corporate, to see if it's a university and a corporate, or
19 just an individual and a corporate. So I'll be able to --
20 allow me to do the comparison or comparability test I needed
21 to to see -- make sure the facts and circumstances of the
22 license that I'm trying to develop matches best -- the best
23 information possible are available.

24 Q. Did Professor Poindexter engage in the analysis you
25 just described with respect to the Battersby book?

1 A. No. I think he said it's not available. The
2 detail of it was just not available. And I would agree with
3 him that the detail in that book is not available.

4 Q. Now, Dr. Poindexter also pointed to several license
5 agreements that Walmart has with other companies. Do you
6 recall that?

7 A. Yes.

8 Q. And what are the trademarks that were covered in
9 the licensing agreements relied on by Dr. Poindexter?

10 A. What I remember is General Electric, Farberware,
11 Better Homes and Gardens, Rival, Sunbeam and Snapper, I
12 believe were the different ones.

13 Q. And have you reviewed all the license agreements
14 upon which Dr. Poindexter relies?

15 A. Yes, I have.

16 Q. And did you prepare a Demonstrative that
17 illustrates the terms of those license agreements?

18 A. Yes.

19 Q. And did you prepare it yourself?

20 A. Yes.

21 Q. Could you look in your binder at DDX-12, please.
22 DDX-12.

23 A. So this is a summary of the licenses that I
24 reviewed and it's laid out -- the way it's laid out is on the
25 left-hand column you can see the trademarks being licensed,

1 and then the second column refers to the strength of the mark
2 of what was licensed. The next one determines whether or not
3 that license was either exclusive or nonexclusive, and that's
4 important because exclusive licenses tend to be priced higher
5 than a nonexclusive license.

6 The next column refers to what was licensed. And
7 you need to make a comparison as far as what was actually
8 licensed to make sure you're comparing apples to apples.

9 The next column talks about products and what was
10 actually licensed in the agreements, and again, you're trying
11 to determine apples and apples. Was it small kitchen
12 appliances or was it outdoor barbecue grills?

13 So -- and then the last three columns refer to the
14 economics of the license.

15 Q. And you said a couple times that the exercise here
16 is to determine whether you're comparing apples to apples.
17 Using the chart that includes the terms in the license
18 agreements, could you walk us through whether the license
19 agreements that Professor Poindexter relies on are comparable
20 to a potential agreement, a theoretical agreement, between
21 Walmart on the one hand and Variety on the other?

22 A. Well, sure. First of all, my analysis will show
23 that they were not comparable. And the reasons why they are
24 not comparable is, again, if you look at the first column and
25 you look at the trademarks and what was actually licensed,

1 we're comparing General Electric and we're comparing Better
2 Homes and Gardens to a small regional retailer that has a
3 little-known brand. And so there's no comparability in that
4 aspect.

5 With regards to exclusivity, the fact that they're
6 comparing Variety and I believe they're asking for an
7 exclusive license or saying that what was -- would have been
8 negotiated was an exclusive license and they're comparing
9 that both exclusive and nonexclusive in their analysis, so
10 that's a comparison of apples to oranges right there.

11 The next column talks about the products. And as I
12 was describing earlier, General Electric and Farberware and
13 Rival all has to do with small kitchen appliances. Sunbeam
14 also was small kitchen appliances. Snapper was outdoor power
15 equipment, which I believe was probably leaf blowers or
16 lawnmower. And then Better Homes and Gardens did have a
17 variety of products, including indoor products and outdoor
18 products.

19 And our case, we're looking at licensing a name for
20 the use on grilling products, so none of these are comparable
21 from a product perspective. The only one that has -- that
22 I'm aware of that had -- that showed up on grills was Walmart
23 did sell some Better Homes and Gardens grills. So the only
24 thing that we could be comparable on a product basis would be
25 Better Homes and Gardens.

1 Q. Is that shown on your chart?

2 A. Yes. Better Homes and Gardens would be the ones
3 shown up as either the third or fourth row of information.

4 The next thing I would have -- next thing I did was
5 I looked at the economics, and I think we heard testimony
6 yesterday, and I think Dr. Poindexter would agree that some
7 of these were based on I think he said cost of goods sold.
8 They're actually based on first cost. First cost is actually
9 further up the line, if you will. First cost is the cost
10 associated with the product as it comes out of the
11 manufacturing facility. It doesn't include the costs of
12 tariffs or duty or shipping it to the distribution center.

13 So when I think Dr. Poindexter said, well, you
14 would just take the 5 percent for General Electric, I think
15 he pointed out, and multiply it by the 661 million, that's
16 overstating it because that includes costs associated with
17 duties and tariffs and shipping to a distribution center. So
18 having a chart that shows both the royalty rates on a cost
19 and a sales revenue basis in one chart I think is misleading
20 because it shows -- it gives you a number of 5 percent
21 without making an adjustment for what that license would
22 really be worth on a net revenue level. I believe I did that
23 calculation last night.

24 I believe if you look at the 5 percent for the
25 General Electric -- and I had to do it on a cost of goods

1 sold basis because I didn't have the first cost number. So
2 this would be a conservative estimate, but I believe
3 adjusting that General Electric number would change it to
4 about 3.75 percent. And you also had to look -- you would
5 have to look at that on the Sunbeam license and adjusting the
6 Sunbeam license because that's also on a first cost basis,
7 and so the number of 4 percent is also too high because it's
8 based on a cost basis.

9 And so for a variety of reasons, none of these
10 agreements that have been identified would be comparable to
11 the license that we would want to negotiate or that would
12 need to be negotiated with Variety assuming the hypothetical
13 negotiation.

14 Q. So in your opinion does the collection of license
15 agreements that Professor Poindexter looked at between
16 Walmart and other companies, does that provide a basis to
17 arrive at a royalty figure in this case?

18 A. No. Again, the only thing that's even remotely
19 close -- and again, I don't think this agreement is
20 comparable because of the strength of the trademark and
21 because of other factors, with like how many trademarks are
22 actually licensed. But as I said, Better Homes and Gardens
23 actually did -- they did sell products that had Better Homes
24 and Gardens' mark on it, and the royalty rate associated with
25 that would be 1.68 percent. So -- but again, I don't think

1 that that's even a comparable license, but my opinion is that
2 none of these other licenses would be considered as
3 comparable.

4 Q. So as a result, what's your opinion concerning Dr.
5 Poindexter's opinion that at least 5 percent is an
6 appropriate royalty amount?

7 A. Based on my analysis and based on the comparability
8 of the licenses that have been identified in this case, I
9 don't see any evidence to support a royalty rate, let alone a
10 royalty rate of 5 or 10 percent.

11 Q. Now, Mr. Rogers, if a royalty was awarded, do you
12 have an opinion what would be the appropriate royalty base?
13 What should the percentage be applied to?

14 A. Dr. Poindexter would say it's the entire sales
15 revenue for the U.S. I think it would be based on those
16 areas where the parties compete, again, so I think it would
17 be limited to those areas within a 25-mile radius of a
18 Variety store.

19 Q. So if a royalty is awarded, you believe the royalty
20 should be lower than Dr. Poindexter, and you believe that the
21 royalty percentage should be applied to revenue at the
22 25-mile radius, chart DDX-11, correct?

23 A. Yes.

24 Q. Now, part of this royalty exercise is an attempt to
25 understand what the parties might have arrived at in a

1 hypothetical negotiation, correct?

2 A. Yes.

3 Q. And did you hear evidence from Mr. Puglisi
4 concerning other companies that used Backyard in the
5 marketplace?

6 A. Well, yes. Before that, if you don't mind, I also
7 heard testimony from Mr. Blackburn that would lay out what he
8 believes their position would be in a royalty negotiation.
9 So that gives me -- in a hypothetical negotiation, I need to
10 understand what both parties would be expected to -- or would
11 like to receive in the -- to end up with a reasonable
12 royalty. So what Dr. Poindexter didn't consider, I don't
13 believe, or that Mr. Blackburn didn't consider was what
14 royalties -- what Walmart's position would be heading into a
15 hypothetical negotiation.

16 And based on the information that was provided by
17 Mr. Puglisi, my understanding or my assessment would be that
18 Walmart would have basically three different options as they
19 sat down to discuss a hypothetical negotiation. They could
20 have taken the license with Variety or taken a license at
21 whatever rate that they may have agreed to. They could have
22 gone out and licensed to one of the other parties that Mr.
23 Puglisi -- I'm sorry, I'm pronouncing that name wrong --
24 identified as were currently selling in the market or they
25 could have changed the name.

1 Q. So you think that Mr. Blackburn and Professor
2 Poindexter's opinions concerning the hypothetical negotiation
3 are incomplete?

4 A. I think they're incomplete, yes.

5 Q. Now, one last topic, Mr. Rogers. Do you understand
6 that Variety is asking for both a reasonable royalty payment
7 and a portion of Walmart's profits?

8 A. Yes, that's my understanding.

9 Q. And do you have an opinion on whether Variety
10 should be entitled to both as a matter of economics?

11 MR. ADAMS: Objection, your Honor. That goes well
12 outside his report and it's a matter of law for the Court.

13 THE COURT: Sustained.

14 Q. (By Mr. Puzella) In your experience, Mr. Rogers,
15 is a royalty payment a cost that is a variable cost which
16 should be deducted in trying to arrive at incremental profit?

17 A. If a company were to have to pay a royalty, that
18 would be incremental cost that would have to be included in a
19 calculation of profits.

20 Q. Mr. Rogers, what's your opinion concerning royalty
21 and profit in this case?

22 A. Well, as I've testified to, in my opinion, based on
23 the analysis and based on the information and evidence that
24 I've seen from both Dr. Van Liere's survey and Walmart's
25 testimony which stated that there was -- the name did not

1 cause the sale, so if the name did not cause the sale, then
2 any profits generated from those sales were driven by other
3 factors other than the name. So again, no matter what level
4 of profit I'm looking at, none of those profits were due to
5 the name.

6 With regards to royalties, again, it's my opinion
7 that royalties are not appropriate in this matter as they are
8 not technically a lost royalty. If royalties were to be
9 awarded, I've seen no evidence to support a royalty rate, let
10 alone a royalty rate of 5 or 10 percent.

11 Q. For the jury's benefit, based on Professor
12 Poindexter's revenue figure, could you tell them
13 approximately a royalty amount that would be 4 percent on
14 sales throughout the United States?

15 A. Yes. So based on Dr. Poindexter's number of
16 revenue, U.S. revenue -- I'm sorry, total Walmart revenue,
17 which I think was 910-some-odd million dollars, 4 percent
18 revenue -- sorry. A 4 percent royalty rate based on that
19 level of revenue would be \$36.4 million, I believe.

20 Q. What would a 3 percent royalty be?

21 A. A 3 percent royalty would be -- I think it would be
22 \$27.3 million.

23 Q. What would a 2 percent royalty be?

24 A. 2 percent royalty I believe would be \$18.2 million.

25 Q. What would a 1 percent royalty be?

1 A. A 1 percent royalty would be 9.1 million.

2 Q. Do you believe any of those amounts should be
3 awarded?

4 A. No. Because I think if -- again, the final step
5 was if a royalty were to be awarded, I believe Dr. Poindexter
6 and Mr. Blackburn were saying it would be an exclusive
7 license. If it was an exclusive license, that would mean
8 Variety would not have been able to participate in the
9 market, so any profits that they made historically on their
10 products would have to be offset against any royalty that
11 they would have been -- that they would be awarded.

12 Q. And did Professor Poindexter engage in that
13 analysis?

14 A. No, he did not.

15 MR. PUZELLA: No further questions.

16 THE COURT: Any cross?

17 MR. ADAMS: Yes, your Honor.

18 **CROSS-EXAMINATION**

19 BY MR. ADAMS:

20 Q. Good morning, Mr. Rogers.

21 A. Good morning, sir.

22 Q. We'll put up P-88. Let's zoom in to the lower part
23 of that page. Mr. Rogers, on September 15, 2016, you
24 testified under oath in response to questions from Mr. Shaw
25 here that none of your reports or testimony had ever been

1 excluded by a Court. Do you recall that testimony?

2 A. Yes.

3 Q. And --

4 A. I said not that I'm aware of; that's correct.

5 Q. Let's look at it. It says, have any reports been
6 excluded by a Court you're aware of? And you said, not that
7 I'm aware. Has any of your testimony ever been excluded by a
8 Court? Not that I'm aware of. Has any portion -- has any
9 portion of your reports been limited by a Court, and you
10 said, not that I'm aware of.

11 And you recall on October 11 -- let's put up P-89.
12 On October 11, 2016, in front of Judge Boyle, you testified
13 on behalf -- in response to a question from your own attorney
14 under oath. Mr. Puzella asked you, to the best of your
15 knowledge have any of your expert opinions on IP damages ever
16 been excluded by a Court? What was your answer?

17 A. I said no, again, not to the best of my knowledge.

18 Q. Okay. Now, notice Mr. Puzella didn't ask you that
19 question today, did he?

20 A. I guess I'm not sure. I don't believe so.

21 Q. What would your answer have been if he asked you
22 that question under oath?

23 A. Well, I have had some reports that have been
24 excluded based on information that would be other than my
25 methodologies employed in the cases.

1 Q. Why wasn't that told to Mr. Shaw when he asked you
2 those questions, and why wasn't it told to Mr. Puzella when
3 he asked you that question in front of Judge Boyle in October
4 of 2016?

5 A. Well, as I said, I wasn't aware of those. Although
6 lots of times -- I wasn't aware of any of those issues. I
7 don't exactly know when I became aware, but a number of the
8 issues when a Court makes a ruling, I don't always hear that
9 as the expert. So there was a couple that have come to light
10 that -- with regards to some of my reports which I now know
11 have been excluded by a Court with regards to a report.

12 Q. Did you discuss with Mr. Puzella whether he should
13 ask you that question today?

14 A. No.

15 Q. Let's look at P-90. You testified or provided an
16 expert report in the case of Electro-Mechanical Corporation
17 versus Power Distribution Products in 2013?

18 A. Yes.

19 Q. And that was a patent infringement case. That's an
20 IP damage case, correct?

21 A. That's correct.

22 Q. Now, let's go to pages 14 and 15. And you were
23 hired in that case to provide both an expert report and
24 testimony; is that right?

25 A. Yes.

1 Q. You see the highlighted portion; portion that says:
2 Rogers' only calculation regarding lost profits was based on
3 the entire market value rule. Rogers opined that EMC had
4 lost profits totaling \$624,494 based -- you calculated the
5 number based on a certain assumption, didn't you?

6 A. I don't particularly remember the specifics.

7 Q. It says further down: Both of these numbers were
8 based on lost profits from sales in the entire longwall power
9 systems, rather than only the systems' draw-out tray devices
10 contained therein. Then it says you calculated a reasonable
11 royalty rate which would be 4.325 percent and you multiplied
12 the royalty rate. Let's go over to page 15.

13 So the jury ultimately awarded \$491,046 in damages,
14 indicating that it accepted Rogers' calculation of lost
15 profits based on the entire market value rule.

16 The Court continues: I find this award to be
17 clearly excessive given the nature of the evidence. Because
18 Rogers failed to provide any calculation of lost profits
19 based on sales of the infringing CS-5 devices alone, the
20 maximum award supported by the evidence was a reasonable
21 royalty based on Rogers' proposed royalty rate of
22 4.35 percent -- 325 percent. Applying the royalty rate to
23 the defendants' sales of 25 such-and-such devices, the
24 highest reasonable royalty award supported by the evidence is
25 \$21,625.

1 So, Mr. Rogers, because you failed to apply the
2 calculation to the correct facts in the case, instead of the
3 \$491,046 in damages that you said should be awarded, the
4 Court only awarded \$21,625; is that right?

5 A. No, that's not right.

6 Q. How am I wrong?

7 A. The jury awarded the numbers based on profits that
8 I identified in the case. My understanding, after the case
9 the Judge determined that -- he felt -- I did an analysis to
10 talk about the entire market value rule. My understanding is
11 the Court determined that he didn't feel there was enough
12 evidence to support an entire market value rule calculation,
13 so he asked for a new trial on damages to address the issue
14 as far as entire market value rule. My understanding is that
15 the parties settled after that and settled favorably for the
16 client after that, so we never got to the issue as far as
17 whether or not there was enough evidence to support a ruling
18 of an entire market value rule.

19 Q. Were you aware of this decision by the Court when
20 you gave your testimony in this case earlier?

21 A. No.

22 Q. Now, you also acted as an expert in the Polyzen
23 versus RadiaDyne case, correct?

24 A. Yes.

25 Q. And let's put up P-91. Let's go to page 23. Who

1 are you representing in this case, Mr. Rogers?

2 A. (Perusing documents). Polyzen. There's a couple
3 different Polyzen matters, but Polyzen.

4 Q. Let's look at page 23. This concerns your
5 testimony. And can you enlarge that. As for Rogers'
6 testimony concerning damages arising from RadiaDyne's alleged
7 trade-secret misappropriation, Rogers opines that RadiaDyne's
8 alleged trade-secret misappropriation unjustly enriched
9 RadiaDyne by a little over \$3 million, correct?

10 A. That's what it says, yes.

11 Q. At Rogers' deposition and in his report, however,
12 Rogers did not identify any specific trade secret of Polyzen
13 at issue in this case. Rogers also failed to explain how, if
14 at all, RadiaDyne or Dielectrics used any alleged Polyzen
15 trade secret to make balloons for RadiaDyne. Furthermore,
16 Rogers' expert report reveals that he did not even review the
17 single document that might contain the Polyzen trade secret
18 that remains at issue in this case.

19 Did I read that correctly?

20 A. I'll believe that you read that correctly.

21 Q. Skipping down a few lines. Beginning with, rather.
22 Rather, Rogers' report and testimony assume that RadiaDyne's
23 incremental profits from switching suppliers from Polyzen to
24 Dielectrics was due solely and entirely to the alleged
25 trade-secret misappropriation that Polyzen included in its

1 amended complaint. Moreover, Rogers admitted that he did not
2 try to connect Polyzen's alleged unjust-enrichment damages
3 arising from the alleged trade-secret misappropriation,
4 quote, in any specific way to any drawings or whether or not
5 anything in those drawings was in the public domain at that
6 time or whether or not there's any evidence that Dielectrics
7 even used any of those drawings because he assumed liability.

8 Rogers' report and testimony concerning Polyzen's
9 trade-secret misappropriation claim are deeply flawed in
10 light of this court's summary judgment ruling concerning
11 Polyzen's trade secret misappropriation claim. In that
12 ruling, the court limited Polyzen's claim DA-DA-DA which
13 contains specifications that define the depth of the three
14 layers.

15 Let's go over to page 24. Rogers' damages
16 calculations are based on assumptions about Polyzen's
17 trade-secret misappropriation that are unconnected to Note 1
18 of DIE-279 and the existing evidence. As such, the evidence
19 is irrelevant and unreliable. Additionally, Rogers' damages
20 calculations are based on assumptions regarding Polyzen's
21 success on all of its claims that are no longer viable in
22 light of this court's summary judgment ruling.

23 Skipping down further. Thus, the court grants
24 RadiaDyne's motion in limine to exclude Rogers from
25 testifying that Polyzen suffered damages from RadiaDyne's

1 alleged trade-secret misappropriation.

2 As for Rogers' testimony concerning Polyzen's
3 breach of contract claim, Rogers opines that if RadiaDyne is
4 found liable for breach of contract, then Polyzen should
5 receive damages based on paragraph 6.d and so forth.
6 According to Rogers, the total damages associated with
7 RadiaDyne's breach of contract is -- and it says roughly
8 \$954,000.

9 Rogers' testimony concerning Polyzen's breach of
10 contract claim ignores this court's order of February 18,
11 2015. Accordingly, Rogers' opinion on contract damages is
12 not tied to the facts of this case and is irrelevant and
13 unreliable. Thus, the court grants RadiaDyne's motion in
14 limine to exclude Rogers from testifying that Polyzen
15 suffered damages from RadiaDyne's alleged breach of contract.

16 Mr. Rogers, you were aware of the order in this
17 case when you gave testimony before Judge Boyle that none of
18 your reports had ever been excluded, weren't you? In fact,
19 it was only less than three weeks before that hearing.

20 A. No, I wasn't. I wasn't made aware of that by -- so
21 the important thing --

22 Q. Wait a minute. You mean that the attorneys and the
23 client that were paying you for this report never called you
24 up and said, hey, wait a minute, this report we paid you for,
25 the Court kicked it out? You never found that out?

1 A. That is correct. He never called me. I'd be happy
2 to answer that question if you would allow me to.

3 Q. Sure. Go ahead.

4 A. So the important thing in that -- what you all read
5 was the fact that there was a motion that was granted by the
6 Court that changed the facts and circumstances of the report
7 that I submitted in this matter. So my understanding, as far
8 as talking to the attorney after I found out about this, was
9 the attorney decided not to update the report because he was
10 reserving his right to appeal the Judge's ruling. And so he
11 never let me know that there was a change in the Court order
12 which required -- which would have required me to update my
13 report, and this -- these cases are still active.

14 Q. Did you testify on behalf of one of the parties in
15 Miller v. Miller?

16 A. Yes.

17 Q. Can you put P-92 up, please. In this case you were
18 hired by one of the parties to prepare a report and testify
19 regarding the fair market value of certain properties,
20 correct?

21 A. In a divorce matter; that's correct. Marital
22 dissolution.

23 Q. You prepared a report, and a few days before the
24 trial you discovered that you had made a serious mistake in
25 that report, right?

1 A. I made an error and self-reported it by correcting
2 it and providing a new report.

3 Q. Right. So you went to the attorney and you were
4 representing your party -- for your party on the eve of trial
5 about this, and what did the trial court do?

6 A. The trial court let me testify, admitted me as an
7 expert, and then made the ruling that I was not allowed to
8 testify to the updated report. And so since I couldn't
9 testify to the updated report, because it was delivered I
10 think the Friday before trial started, I wasn't allowed to
11 testify to the new numbers in the new report.

12 Q. You knew it was excluded?

13 A. Again, I didn't know this -- I guess -- no, I mean,
14 I knew that --

15 Q. Mr. Rogers --

16 A. -- when I was talking --

17 Q. Mr. Rogers, you just said you knew the report had
18 been excluded because you testified, but the Judge wouldn't
19 let the report in?

20 A. The Judge would not allow the report in, but I
21 still testified in the matter.

22 Q. Right. So what did the Court do? The Court
23 excluded the new report?

24 A. Yes.

25 Q. What did it do with the report? Let's look at the

1 language. The Court found Rogers' report contained material
2 errors and his conclusions as to value contained in his --
3 this report are unreliable. The Court excluded the report
4 under Rule of Evidence 702 and determined the report would
5 not assist the trier of fact. They appealed that, correct?

6 A. I don't know the details of that.

7 Q. Go down to the bottom. This is a Court of Appeals
8 opinion. The Court of Appeals said: The trial court
9 properly excluded Graham's 17 June 2014 report and testimony.
10 The report was unreliable and not helpful to the finder of
11 fact.

12 A. Yes. And as I said, I self-reported that by
13 identifying the error prior to trial, --

14 Q. Right.

15 A. -- correcting the report --

16 Q. And your --

17 A. -- delivering that --

18 Q. Your testimony in this court and before Mr. Shaw
19 was false, wasn't it, when you said you never had a report
20 excluded?

21 A. I don't necessarily think that it was false, no.
22 This was a marital dissolution matter; it's not a complex
23 commercial litigation matter with regards to intellectual
24 property.

25 Q. This question was not limited to just IP matters.

1 Mr. Puzella's was but not Mr. Shaw's. So why did you tell
2 Mr. Shaw -- he asked you three separate questions. Why did
3 you not tell him you had any of these reports excluded?

4 A. I didn't know about the majority of these reports.
5 This is a report that I potentially -- it was the only report
6 I knew about. But this is a report I identified the error
7 myself and delivered to the Court ahead of time. And the
8 only reason why the other report was -- I wasn't allowed to
9 testify to the other report is because I provided a new
10 report with the correct numbers in it which was not allowed.

11 Q. How often have your expert reports been critiqued
12 because they contain incorrect or inaccurate information, Mr.
13 Rogers, in the aggregate?

14 A. I don't know the answer. I probably have talked
15 about the majority of them. There's -- in every single
16 instance as an expert, either the Judge or the jury is not
17 going to agree with everything I say. That's why there's an
18 expert on both sides, and the Judge or the jury weigh
19 testimony provided by both sides and can develop their own
20 conclusions. So there's very rarely that I'm going to have a
21 result that's going to match exactly to the testimony that I
22 put forth.

23 Q. Mr. Rogers, we're not talking about a disagreement
24 between two experts that a jury has to weigh. We're talking
25 about testimony that you gave that was false or incorrect and

1 was excluded by a court.

2 Now, did you also involve yourself in the HCW
3 Retirement and Financial Services versus HCW Employment (sic)
4 Benefit Services case?

5 A. Yes.

6 MR. ADAMS: Put up P-93, page 1.

7 Q. (By Mr. Adams) And do you recall preparing a
8 report in a trademark infringement case that I just
9 referenced?

10 A. I'm sorry, what was the question?

11 Q. Yes. Do you recall preparing a report in that
12 case?

13 A. Yes.

14 Q. And do you recall that the opposing party filed a
15 motion in limine to exclude your report?

16 A. I know now, yes.

17 Q. When did you first find out?

18 A. Sometime after trial.

19 Q. After which trial?

20 A. This trial.

21 Q. This trial meaning which trial?

22 A. So --

23 Q. This is 2015.

24 A. -- in this matter --

25 Q. Excuse me. My question is, when did you find out

1 about this particular matter, the motion in limine to exclude
2 your report?

3 A. Probably December of 2017.

4 Q. So why did it take two years for you to find out
5 that your report in this case had been excluded?

6 A. As I stated, I don't always hear from counsel as a
7 case goes on what happens with my report. Sometimes our
8 system submits the report and the parties settle. Sometimes
9 they submit the report and it goes to trial. Most of the
10 time it does not go to trial, so lots of times I don't hear.
11 I sometimes will get a phone call saying the case is
12 completed, we no longer have to do any more work.

13 Q. All right. What happened in this motion in limine,
14 Mr. Graham (sic)?

15 A. My understanding is that the attorneys asked for my
16 report after a discovery deadline and submitted my report
17 after a discovery deadline, and so because of a discovery
18 deadline it was not included in the case.

19 Q. Right. So the plaintiff's motion in limine is
20 granted with regard to Graham Rogers' opinions regarding
21 damages caused to defendants by plaintiff's alleged actions,
22 and defendants are prohibited from offering testimony,
23 argument or other evidence regarding Rogers' opinions and
24 conclusions about such damages.

25 Is it the case that so far at least, you can't

1 remember learning about any of these opinions until after you
2 gave your deposition in this case and your testimony in an
3 earlier proceeding?

4 A. I specifically remember this was December of 2017.

5 Q. All right. So why did you not tell anybody about
6 this?

7 A. What do you mean?

8 Q. Well, this is a change in circumstances, right?
9 You testified earlier on two separate occasions no such
10 reports had been excluded. Why didn't Mr. Puzella ask you to
11 clarify the record? Why did I have to do it?

12 A. I don't know the answer to that question.

13 Q. All right. Did you -- were you hired to give
14 testimony and expert opinion in Armed Services Board of
15 Contract Appeals case involving a company called ESCgov?

16 A. Yes.

17 Q. And what happened there, Mr. Rogers?

18 A. I have no idea.

19 Q. Well, let's find out. So page 6.

20 MR. ADAMS: Put up page 6, paragraph 27. I'm
21 sorry. I think it's 95, I'm sorry. Page 7.

22 Q. (BY MR. ADAMS) So in this case you gave an expert
23 report, and in it you said that your client was entitled to
24 receive \$2,127,924. Do you recall that now?

25 A. No. I mean I recall doing the work, but I don't

1 recall what the numbers were.

2 MR. ADAMS: Let's turn over to page 7.

3 Q. (By Mr. Adams) In paragraph 36 you testified that
4 you did not review ESCgov's accounting and payroll records or
5 audit the information that was provided to them. You were
6 retained by ESCgov to review the termination settlement
7 agreement and issue an opinion letter.

8 Turn over to page 8. And earlier in this case you
9 had testified and your opinion was based on the fact that
10 your client owned certain intellectual property, right?
11 Copyrights on software that Armed Forces had contracted for,
12 correct?

13 A. I don't remember particularly -- I don't remember.

14 Q. So here, top of page 8, Mr. Rogers testified that
15 to his knowledge, ESCgov -- this is the testimony, not your
16 report -- ESCgov did not have a patent or copyright for the
17 intellectual property claimed. Weighing the competing
18 evidence, we find that ESCgov has not adequately established
19 that its claimed intellectual property or software was marked
20 with copyright notifications or other restrictions prior to
21 the termination of the 2012 contract.

22 Go over to page 12. And instead of the 2 million
23 three-hundred-some-thousand dollars you said your client was
24 entitled to -- down at the bottom of that page -- how much
25 did the Armed Forces Board of Contract Appeals award your

1 client?

2 A. Well, like I said, I've never seen this document
3 before, but the numbers you have put up there are 62,000.
4 But I've got no basis to know what this document is.

5 Q. Mr. Rogers, did the documents we've discussed
6 refresh your recollection regarding other reports and
7 testimony of yours that has been excluded in the recent past?

8 A. Like I said, as I sit here today, I knew all about
9 those except for the ESCgov one.

10 Q. All right. Let's look at PX -- let's move forward
11 and look at P-113. Sorry. P-113. Did you render a report
12 in a case called INVUE Security versus Hangzhou? Let's
13 scroll down and --

14 A. Yeah, I think so. I think this was -- I think this
15 was a trade secret matter with regards to a person who was a
16 Chinese individual who was out of the country, I believe.

17 Q. And in this case you provided a report and a motion
18 in limine was filed to strike that report. Do you recall
19 what happened?

20 A. Again, I found out after the fact that this -- my
21 understanding is that what the attorneys asked me for, if I'm
22 remembering this correctly, is that this is what's referred
23 to as a placeholder report. It talks about the methodologies
24 that would be used to calculate the report, calculate the
25 damages once data is received. And as I said, this was a

1 Chinese national and data had not been received. But to be
2 able to make sure we met the Court's deadline, we put in a
3 placeholder report talking about the methodologies and how we
4 would calculate the damages once we received that
5 information. That's what I remember.

6 Q. Mr. Rogers, on page 2 of this report, the reason
7 the Court struck your report was, it says: The report
8 prepared by Rogers provides virtually none of the information
9 required by Rule 26(a)(2)(B)(i). Plaintiff's response to the
10 motion asserts as an excuse for noncompliance lack of
11 sufficient discovery before Rogers prepared his report, and
12 so forth. Why did you prepare the report if virtually none
13 of the information required by Rule 26 was available to you?

14 A. As I just said, to meet a Court's deadline, counsel
15 asked me to put together a report that would identify how the
16 damage would be calculated once we received discovery to be
17 able to fill in the numbers. So the report, like I said --
18 like I said, it was only what was referred to as a
19 placeholder report identifying the methodologies that would
20 be calculated to the Judge.

21 Q. When did you learn this report had been excluded?

22 A. I don't know exactly.

23 Q. Now, let's move to your report in this case, Mr.
24 Rogers. How much have you been paid so far for your reports
25 and testimony in this case? Just approximately.

1 A. I don't know the answer to that.

2 Q. Just approximately? Your best estimate as a
3 financial expert?

4 A. I haven't looked at it, but maybe 200 to \$300,000,
5 over a five-year period.

6 Q. Now, as you testified, like in the Miller and
7 Miller case and some other cases we've looked at, you found a
8 mistake in your report in this case, didn't you, regarding
9 the shipping costs and you supplied an amended report that
10 actually moved up the incremental profit number?

11 THE COURT: Did you say you've been paid 2 to
12 \$300,000?

13 THE WITNESS: Yes, sir, I believe so.

14 THE COURT: Okay.

15 A. I'm sorry, what was the question?

16 Q. (By Mr. Adams) Yes. You've testified already that
17 you found -- there was one mistake in your report that you
18 identified incorrectly having to do with shipping costs,
19 correct?

20 A. Yes. The shipping income was not reported to me by
21 dot-com, and once it was reported to me I made that
22 correction in the report.

23 Q. Well, there's another mistake in the report that
24 hasn't been corrected, isn't there?

25 A. I'm not sure which one you're referring to.

1 Q. Are you aware of a mistake in your report that
2 hasn't been corrected or are you not?

3 A. No, I'm not aware of anything.

4 Q. We'll come back to that in a few minutes.

5 A. At least not that I can recall as I sit here.

6 Q. You understand this is a trademark infringement
7 case, correct?

8 A. Yes.

9 Q. You understand that a jury in this case has already
10 found that Walmart infringed Variety's Backyard trademark?

11 A. In calculating -- yes, in determining my damages I
12 always assume that liability is met, yes.

13 Q. And you're also aware the jury's already found in
14 this case that Walmart's trademark infringement was willful,
15 correct?

16 A. That has no bearing on my analysis.

17 Q. All right. That would be my next question. You
18 haven't taken into account that fact at all, at all?

19 A. Again, it's not normally a factor --

20 Q. Just answer my question, Mr. Rogers. Did you take
21 it into account or not?

22 A. No.

23 Q. Thank you. So you haven't revised your opinion
24 about the jury's decision that Walmart has infringed
25 Variety's Backyard trademark willfully, have you?

1 A. No. Like I said, willful would not come into my
2 calculations.

3 Q. Now, you were prepared -- provided rather -- by
4 Walmart's lawyers with various statements of law that you
5 relied on in preparing your report, didn't you?

6 A. That's not correct.

7 MR. ADAMS: Pull up P-97. Footnote number one.

8 Q. (By Mr. Adams) My understanding of the legal
9 principles set forth in this report and the legal authorities
10 cited in this report were obtained from counsel. Didn't you
11 just say that they weren't?

12 A. Yes. If you let me finish my answer.

13 Q. I had your answer, Mr. Rogers.

14 A. I'm sorry?

15 Q. I asked you a question, were certain legal
16 principles provided to you by Walmart's counsel, and you said
17 no. And I'm pointing out to you that in your own report it
18 says that you were.

19 A. There are citations in my report that I have in my
20 own files from the 22 years of working in these types of
21 matters, and I also have conversations with counsel. I don't
22 know that -- the distinction between what was provided to me
23 by counsel versus what I had already in my files.

24 Q. Okay. Let's go to page 5, paragraph 8. 98, I'm
25 sorry. 98, page 7.

1 All right. Scroll down and look at the highlighted
2 part. Mr. Graham (sic), are you familiar with the Clear Blue
3 case?

4 A. Not specifically, no.

5 Q. Is that a case that was in your archives or was
6 that one that Walmart's attorneys gave you?

7 A. I don't know the answer to that question.

8 Q. Have you ever read this case?

9 A. I would have read all of them that have been in
10 there at one point in time, but I don't necessarily -- I read
11 it from a layman's perspective, not a legal perspective.

12 Q. Is it true to assume, based on what you said in
13 your parens, that the consideration of a reasonable royalty
14 was proper in the Clear Blue case because there was evidence
15 of prior license negotiations between the parties; is that
16 right?

17 A. If that would have been my understanding at the
18 time I would have made that -- identified that negotiation,
19 yes.

20 Q. P-98, page 7. I'm sorry, P-99. Let's go over to
21 page 10. This is an order in the Clear Blue case, document
22 96, filed on December 1st (sic), 2008. This is the Court's
23 comment regarding the arguments by the defendant that a
24 royalty could not be awarded because there had been no prior
25 licensing negotiations between the parties. What did the

1 Court say? You can read it, Mr. Rogers.

2 A. Well, again, I don't know what this document is,
3 but if you're asking me to read what's highlighted up
4 there...

5 Q. Please do.

6 A. In sum, the jury was not required to find evidence
7 of a licensing agreement between the parties or between the
8 plaintiff and a third party in order to decide whether a
9 royalty award was an adequate remedy; the \$2 million verdict
10 is supported by sufficient evidence.

11 Q. Now, Walmart has identified the sales of branded
12 products and accessories accused in the infringement,
13 correct?

14 A. I'm sorry, I couldn't hear that question.

15 Q. Walmart has identified to you -- I think you've
16 testified that they've identified to you the sales -- their
17 sales of branded products and accessories accused in the
18 infringement, correct?

19 A. I don't -- I don't think I understand the question
20 because they didn't provide me the -- I calculated a
21 determination what the sales revenue was if that's what
22 you're asking.

23 Q. They provided you with data from which you
24 calculated the numbers, correct?

25 A. That's correct; yes.

1 Q. And you relied on the Van Liere report for any
2 conclusions regarding the value of The Backyard trademark,
3 correct?

4 A. That's not correct.

5 Q. All right. Correct me.

6 A. I said that I relied on Dr. Van Liere's report to
7 identify what caused the sales of the products, and what
8 caused the sale of the products was driven by Dr. Van Liere's
9 report and the testimony of Walmart personnel. So the
10 profits that Walmart generated due to the sale of the
11 products, since there's no relationship between the cause of
12 the name and the sale, there's no profits that are
13 attributable to the trademark and has nothing to do with
14 value.

15 Q. All right. And you've made no attempt to apportion
16 Walmart's profits between matters involving The Backyard
17 trademark and any other matters, have you? You've simply
18 relied on somebody else's testimony for that?

19 A. Well, I'm not a survey expert in doing these types
20 of analyses. The only way that you could do this type of
21 analysis is to conduct surveys, to have discussions with
22 personnel and evaluate the setting, as I testified to. It
23 would be very common to do surveys. It would be common to
24 talk to the engineers to find out what's driving the sale of
25 a product. So in this case I believe it's very similar. I

1 would have looked at Dr. Van Liere's survey and in this case
2 relied on the testimony of the Walmart personnel.

3 Q. Yes, but Walmart personnel's testimony was not
4 available when you prepared your report, was it?

5 A. That's correct. In my report I relied only on Dr.
6 Van Liere's survey.

7 Q. Have you provided a supplement report that contains
8 your understanding of the testimony that you've received from
9 Walmart's employees?

10 A. No, because I heard a lot of it today or yesterday.

11 Q. And you heard a lot of it in 2016, didn't you?

12 A. I would have heard -- I've heard it in testimony,
13 yes.

14 Q. Yeah. Now, who contacted you about preparing a
15 report for Walmart in this case, Mr. Rogers?

16 A. I'm sorry, who contacted me?

17 Q. Yes.

18 A. A previous attorney. I'm sorry, I'm drawing a
19 blank on her name.

20 Q. Someone who's no longer representing Walmart; is
21 that correct?

22 A. That's correct.

23 Q. Who at Walmart did you talk to regarding your
24 report and testimony?

25 A. Well, it would have been a couple people that were

1 listed in my report and --

2 Q. Let's take a look at it. Exhibit C. Rosalyn
3 Mitchell and Amanda Massaway -- I think you have a typo there
4 in Ms. Massaway's name.

5 A. If I do, I apologize.

6 Q. Ms. Mitchell is an in-house attorney for Walmart;
7 is that right?

8 A. Yes.

9 Q. And what were your discussions with her about?

10 A. The discussions with Walmart at this time were to
11 identify the appropriate Excel spreadsheets that identified
12 the sales and the costs information for the goods in
13 question.

14 Q. Was there any more specific discussion with Ms.
15 Mitchell about the various legal positions that Walmart was
16 interested in you taking?

17 A. No.

18 Q. Was there ever any discussion with you and
19 Mrs. Mitchell about whether or not, for example, your report
20 should take into account all of the United States for sales
21 or just certain parts of the United States?

22 A. No.

23 Q. All right. And what was your discussion with Ms.
24 Massaway about?

25 A. Well, I believe that -- I don't remember having a

1 conversation without both of them on the phone, so they would
2 have all been about identifying the sales and the costs
3 information by store number for the relevant time period
4 we're discussing.

5 Q. All right. Let's look at P-101 on the screen, page
6 4 of 6. These are identification of potential witnesses.
7 And this is the same Ms. Massaway that you had spoken to,
8 correct?

9 A. Yes.

10 Q. And it says, Ms. Massaway has knowledge concerning
11 segment profit and loss statements produced by Walmart and
12 costs incurred by Walmart in selling the product at issue,
13 correct?

14 A. Yes.

15 Q. And what is the specific nature of your
16 conversation with Ms. Massaway regarding that specific
17 subject, the segment profit and loss statements produced by
18 Walmart and costs incurred by Walmart in selling the products
19 at issue?

20 A. I don't specifically -- well, so my recollection is
21 the conversations that I had with Ms. Massaway were with
22 regards to the discussions I was just describing. I also
23 received profit and loss statements from the segment data,
24 but I don't remember if Ms. Massaway was involved in those
25 conversations or not.

1 Q. Now let's turn to PX-24. This has been admitted
2 into evidence. We saw these yesterday, correct?

3 A. Yes.

4 Q. And you've discussed these to some extent this
5 morning, correct?

6 A. Well, the only thing I discussed about these was
7 the differences between Dr. Poindexter's number and my number
8 being about \$109,000 difference.

9 Q. When did you first discuss with anyone at Walmart
10 your suggestion that Walmart's profits be potentially
11 disgorgeable only in 17 states and areas where they compete?

12 A. I don't specifically remember the answer to that
13 question.

14 Q. Well, part of your report relates to how much
15 sales, general, administrative costs should be deducted from
16 Walmart's revenue received from the sale of The Backyard
17 branded products and accessories, and you did that to arrive
18 at an incremental profit amount, correct?

19 A. That's correct.

20 Q. So you've called that SG&A?

21 A. SG&A. Sales, general, administration --

22 Q. We'll stick with that.

23 A. SG&A, that's fine.

24 Q. SG&A items. Rent, salaries, insurance, water,
25 light, heat, et cetera, that generally remain constant,

1 particularly if the sales being discussed are a small
2 percentage of the revenue of a company; isn't that right?

3 A. I think I testified earlier that it's usually made
4 up of a fixed and a variable component.

5 Q. And those items I've read off would be most likely
6 fixed unless the sales in question were a very large
7 component of the company. For example, if someone came --

8 A. No, I don't agree.

9 Q. If someone came in Walmart and bought a dollar
10 stick of chewing gum, how much additional variable cost would
11 Walmart incur?

12 A. From a -- say that again.

13 Q. For a dollar purchase in Walmart, how much
14 additional variable cost would Walmart incur from that one
15 purchase?

16 A. Probably not much. We're not talking about a
17 dollar. We're talking about \$910 million in sales.

18 Q. We're going to get to that too, but you've
19 testified that some of the costs -- some of the SG&A costs
20 are fixed and some are variable, right?

21 A. Based on my analysis utilizing the information
22 provided, I identified that 18.22 percent of sales at the
23 level of sales identified in this case would be variable,
24 yes.

25 Q. All right. Let's look at Plaintiff's Exhibit

1 P-102. This is your testimony, direct testimony in a prior
2 proceeding. You recall testifying in this case back in 2016,
3 right?

4 A. Yes, sir.

5 Q. And first you talk about needing two variables and
6 you talk about linear regression in line 21 and 22. And the
7 highlighted part Mr. Puzella asked you, what do you use for
8 your data, and what was your answer?

9 A. I use the lowest level of financial documents that
10 are available. Do you want me to read exactly?

11 Q. Read it verbatim.

12 A. If we go back starting at line 25, you need to use
13 the lowest level of financial documents that include the
14 products in question, and in this case I used Walmart's
15 financial segment data for the outdoor and garden area, which
16 is where the products in question, that's where they reside.

17 Q. Okay. And why is that?

18 A. Well, again, I'm trying to measure the portion of
19 SG&A, and so I want to try to get to the lowest level of
20 financial documents that are available to try to come up with
21 the most accurate measure.

22 Q. And that's the reason that Walmart's business is
23 divided into several segments or categories, isn't it?

24 A. Yes.

25 Q. They have groceries, health and wellness,

1 electronics, clothing and apparel, and the variable cost and
2 fixed cost between those -- in those particular categories
3 might vary significantly, right?

4 A. They could. I didn't do analysis on that to
5 determine, but yes, they could.

6 Q. Let's use our common sense. Isn't it likely that
7 there would be more variable costs, for example, in operating
8 the grocery department at a Walmart where you have to
9 constantly take out out-of-date goods and replenish and stock
10 the shelves and take out the wilted lettuce and so forth on a
11 daily basis than there would be, for example, where you're
12 buying grills or selling grills and simply got a stack of
13 boxes in the store which someone picks up and takes to the
14 checkout counter? That could be a substantial difference in
15 variable costs between those two categories, correct, and
16 that's why you want the lowest possible -- you said you need
17 the lowest possible --

18 A. I want -- I want the lowest level possible; that's
19 correct.

20 Q. So looking at -- your intention in your report was
21 to determine how much actual SG&A costs went up or down as
22 the sales of Backyard branded products and accessories went
23 up and down, correct?

24 A. I'm sorry, could you repeat that?

25 Q. Yes. So your job, your duty was to -- your

1 intention was to determine how much Walmart's SG&A costs went
2 up or down as the sales of Backyard branded products and
3 accessories went up or down, correct?

4 A. When this cost went up, that's correct.

5 Q. Okay. And your position that SG&A costs went up or
6 down as the sales of Backyard branded products and
7 accessories went up or down should be deducted from Walmart's
8 revenue from the sale of Backyard branded products and
9 accessories, correct?

10 A. Yes, it's my testimony that incremental costs
11 identified should be -- I'm sorry, variable costs should be
12 deducted from gross profits to end up with the incremental
13 profit figure.

14 Q. Let's look at 102. I'm sorry, it's Exhibit H of
15 your report; is that right?

16 A. It says Exhibit H. I don't know --

17 Q. This is Exhibit H to your report, Mr. Rogers?

18 A. It looks like Exhibit H to my report, yes.

19 Q. Now let's turn the page. This is a fairly lengthy
20 exhibit, but is it not the case that what you've done here is
21 you put a description of Walmart's Backyard branded products
22 on the left and the description of Variety's Backyard branded
23 products on the right; is that correct?

24 A. This is a -- this is an analysis that I did early
25 on that discusses -- looking at the sales on a UPC-by-UPC

1 basis; that's correct.

2 Q. So you had specific identification regarding each
3 and every Walmart Backyard branded product that you were
4 given by Walmart; isn't that right?

5 A. The sales Excel spreadsheets I was provided gave me
6 a number of columns of information, of which one of them was
7 a UPC number and one of them was a description.

8 Q. And you also had a revenue for each product,
9 correct?

10 A. I had the revenue. I also had the cost of goods
11 sold for each one as well as a variety -- a lot of other
12 types of data.

13 Q. All right. Let's look at 104. P-104. We've
14 talked in general about SG&A, but what you see on the screen,
15 Mr. Rogers, is actually a listing of selling, general and
16 administrative expense categories, correct?

17 A. I don't know where this comes from, but if I look
18 at it -- I mean, it looks like the types of costs that could
19 be considered as far as SG&A, but each company is a little
20 different.

21 Q. Can you go down this list and identify any
22 particular category which you think would vary significantly
23 with the sale of Walmart's branded -- Backyard branded
24 products at the level that you've testified to?

25 A. Well, as I testified, I did not do an

1 account-by-account basis. That would be impossible to do --

2 Q. I'm asking you now to -- I'm not asking you for
3 numbers. I'm asking you to identify any category on that
4 list that you think is -- based on your experience might vary
5 substantially, given the ratio of total Walmart sales to the
6 sales of Backyard branded products, even one.

7 A. I can't answer that question because I didn't do
8 that analysis. However, we're talking about \$910 million
9 worth of sales, which is absolutely significant. So if a
10 significant change in revenue occurred, then I could expect
11 some or all of these costs to vary.

12 Q. You would expect insurance to vary?

13 A. Potentially, sure. If you needed additional
14 insurance to cover \$910 million worth of product, yes.

15 Q. Advertising?

16 A. Yes.

17 Q. Significant variation?

18 A. I don't know the answer to that. I did not do an
19 account-by-account basis. I did --

20 Q. Let's look at 104 -- I'm sorry, 105. This is D-224
21 from a prior hearing in this case, Mr. Rogers. You've seen
22 this report before, haven't you?

23 A. Yeah, I believe this is from my report.

24 Q. Yes, it's from your report. And you've testified
25 about it previously, haven't you?

1 A. Yes. I assume so, yes.

2 Q. You didn't testify about it today, did you?

3 A. I didn't talk about the specifics, no.

4 Q. Okay. Well, you've testified that you needed to go
5 to the home and garden area because that was the one where
6 the barbecue grills and accessories were, right?

7 A. I had to go to the lowest level of financial
8 segment data.

9 Q. You said you went to the home and garden?

10 A. Yes, that's the data that I was given.

11 Q. And the reason is that your assumption is that the
12 variable cost and fixed cost in that category would be more
13 likely characteristic of the barbecue grills than it might be
14 in pharmacy or groceries or some other area, correct?

15 A. Again, the purpose is to identify the lowest level
16 of financial data that's available to me, and this is the
17 lowest level of financial data that's available to me.

18 Q. Look in the upper left-hand column and where it
19 says year-to-date January 31, 2013. What is that number?

20 A. Which number are you referring to? Net sales or --

21 Q. Under year-to-date January 31, 2013.

22 A. Well, it would be \$274 billion.

23 Q. Yes, 274,433,000,000. Is it your testimony that
24 that was the sales in Walmart's home and garden center in
25 2013?

1 A. That was the information provided to me by Walmart,
2 yes.

3 Q. Think, Mr. Rogers. \$274 billion of home and garden
4 sales in one year.

5 A. That was the information provided to me by Walmart,
6 yes.

7 Q. Mr. Rogers, I'll put it to you and I can show you
8 the financial reports if you want me to, but I represent to
9 you that \$274,433,000,000 number is Walmart's gross revenue
10 for all sales within the United States including online. All
11 sales. Including electronics, grocery, health and wellness
12 and all the other categories. That's the number that you've
13 told the jury you used in calculating your SG&A; isn't that
14 right?

15 A. I told the jury I used the lowest level of
16 financial segment data available to me.

17 Q. You said you used the home and garden section. I
18 can read you the testimony again if you would like me to.

19 A. It's probably what I said, but I believe that's the
20 lowest level of segment data.

21 Q. That's the home and garden?

22 A. That's what was provided to me.

23 Q. Sir, did you look at it to see if it looked at all
24 reasonable? Did you compare it with what Walmart's financial
25 reports said about their gross revenue throughout the entire

1 United States for all categories for an entire year?

2 A. No.

3 Q. Why didn't you do that?

4 A. I took the document as it was reported to me as
5 being the lowest level of financial data that was provided to
6 me.

7 Q. You assumed that Walmart had sold \$274,433,000,000
8 worth of home and garden equipment in one year in the United
9 States; is that your testimony?

10 A. Yes, that's my testimony, was I used the lowest
11 level of financial data provided to me.

12 Q. I'm not going to repeat myself one more time. You
13 said that you used the data from the home and garden center
14 because you needed that segment because it was the lowest,
15 but that's not what you did. Now, you came up with
16 18.22 percent for SG&A, correct?

17 A. Yes.

18 Q. So by definition, just on your testimony, that
19 18.22 percent would have to relate to the entire
20 \$274,433,000,000, wouldn't it?

21 A. Yes.

22 Q. And it would not relate to the \$911 million of
23 infringement of The Backyard grills we're here to talk about,
24 would it?

25 A. Yes, it would, because you use the regression --

1 the results of the regression to develop a model to estimate
2 the costs associated with an incremental revenue number. So
3 the results that showed up from the regression analysis of
4 18.22 percent is then applied to the revenues of the products
5 in this case to come up with the incremental portions of the
6 SG&A.

7 Q. That's not what you testified you did. You just
8 told the jury that number up there was the sales for home and
9 garden equipment, and what I -- check me if you think I'm
10 wrong. But that number up there is Walmart's total sales
11 throughout the entire company for that particular year. Is
12 it not true that the SG&A for pharmacy or health and
13 wellness, for example, might be significantly different than
14 for Backyard Barbecue grills?

15 A. I don't know the answer to that question.

16 Q. Isn't it true that the SG&A in the grocery
17 department might be significantly different?

18 A. I don't know the answer to that question.

19 Q. How would you go about finding out? At this point,
20 you might want to go back to that list of SG&A categories and
21 talk to someone about barbecue grills or something in the
22 home and garden area, correct?

23 A. As I testified to, a company of any size, it's
24 impossible to do that.

25 Q. Is it your testimony that over a period of four

1 years you never looked at that number carefully enough to
2 recognize that it was \$274,433,000,000?

3 A. I don't understand what you're asking me. Like I
4 said, it's the lowest level of financial segment data that I
5 was provided.

6 Q. Let me ask you this. What is the percentage of
7 that number 274,433,000,000 represented by the \$911 million
8 of barbecue grills and accessories that we're here talking
9 about?

10 A. Well, we've had this conversation before, but I
11 think it's probably about .07 percent.

12 Q. .08 percent. Another way to put it is that 99
13 point -- yes, 99.2 percent -- I'm sorry, 99.02 percent of all
14 the data up there is something other than Backyard grills.
15 Now let me ask you this. What percentage of Walmart's total
16 sales throughout the United States are in the home and garden
17 area?

18 A. I don't specifically know the answer to that
19 question.

20 Q. Okay. Let's find out.

21 THE COURT: We're going to stop for luncheon recess
22 and we'll resume at 1:45.

23 (Jury out at 12:30 p.m.)

24 (Recess at 12:30 p.m. to 1:52 p.m.)

25 (The witness resumed the witness stand at 1:40 p.m.)

1 (Jury in at 1:52 p.m.)

2 THE COURT: You can continue with your cross.

3 Q. (By Mr. Adams) Mr. Rogers, I want to back up just
4 for a moment. I don't think we actually covered all of this.
5 I want you to go to the top, and if you can't read it I can.
6 The question was -- this is Mr. Puzella questioning you:
7 What do you use for your data? And your answer was, you need
8 to use the lowest level of financial documents that include
9 the products in question. In this case, I used Walmart's
10 financial segment data for the outdoor and garden area, which
11 is where the products in question, that's where they reside.
12 Did I read that correctly?

13 A. Yes, you did.

14 Q. And then Mr. Puzella turned to Exhibits D-224,
15 which we looked at, and also D-225, both of which are in
16 evidence and which we'll look at again in just a moment. So
17 Mr. Puzella then asked you: Are these the segment data
18 documents that you just referenced? And your answer was: I
19 guess they are. And those are the documents you relied on
20 for purposes of your SG&A calculations? Did I read that
21 correctly?

22 A. Yes.

23 Q. And was that a truthful answer when you gave it --

24 A. Yes.

25 Q. -- to the best of your knowledge? When in fact

1 those documents were not home and garden data, were they?

2 A. I don't know the answer to that.

3 Q. We just looked at D-224. Do you want to put it
4 back up? Do you want to -- maybe we can go to the annual
5 report at this point. Would that clarify your --

6 A. No, sir. The information that was given to me was
7 reportedly the lowest level of financial data that included
8 the lawn and garden area.

9 Q. But can we agree that that category is not just for
10 home and garden?

11 A. I don't know the answer to that. All I know --

12 Q. Who would --

13 A. The information provided to me is the lowest level
14 of financial data provided.

15 Q. Who gave you that data?

16 A. Walmart.

17 Q. Which individual handed it to you or e-mailed it to
18 you?

19 A. I don't remember.

20 Q. All right. Let's go back to 224 just briefly.
21 We've looked at the left-hand column, which is year-to-date
22 January 31, 2013. I think we can all agree that that number
23 is \$274,433,000,000, correct?

24 A. I can't read that, but I think that sounds right.

25 Q. And for the previous year, 2012, the number was

1 slightly different. It was \$264,185,000,000, correct?

2 A. Yes, that looks like it's right.

3 Q. Now, let's go to D-225. And you're familiar with
4 this document as well, are you not?

5 A. I believe this is the same document, just different
6 years.

7 Q. Yes. So across the top, you have the years 2016 on
8 the left and 2015 on the right. And what are the numbers for
9 2015, net sales?

10 A. I think it's \$288 billion.

11 Q. Let's call it 298 billion 378 million.

12 A. I'm sorry, 2015?

13 Q. I'm sorry. If I did, I apologize. 288,049.

14 A. That's what I thought you asked me, yes.

15 Q. Then the 2016 data, that's 298 billion 378?

16 A. 298, yes.

17 Q. You say you don't know at this point what data that
18 is, what it reflects; is that right? You just know that it
19 was given to you?

20 A. No, I've told you that was the information given to
21 me, which was the lowest level of financial data that
22 includes the products in question.

23 Q. I don't want to belabor this, Mr. Rogers, but we
24 just read your testimony. Is it your testimony that the
25 company the size and sophistication of Walmart can't supply

1 data that covers a particular product segment of its sales?

2 A. I don't know whether they can or cannot. All I can
3 tell you is when I asked for it on a couple of different
4 occasions, this is the document that I received as being the
5 lowest level of financial data available.

6 Q. But you referenced it as the lawn and garden
7 segment, and we know that's not true, don't we?

8 A. I don't know the answer to that question. I know
9 it includes the lawn and garden equipment.

10 Q. All right. Let's go to 107. And on page 19, you
11 see a chart in the middle of the page. And again, that's
12 dollar amounts in millions; is that right?

13 A. I don't know what this document is.

14 Q. I'm sorry, this is the 2012 Walmart annual report.

15 A. Okay.

16 Q. So according to Walmart's annual report, the net
17 sales Walmart U.S. for 2012 was \$264,186,000,000. That's
18 very nearly the same number we just saw on Exhibit 224; isn't
19 that right?

20 A. Appears to be, yes.

21 Q. Now, let's go over to P-109. Let's zoom in on the
22 strategic merchandise unit. Mr. Rogers, on this table, what
23 are the two lowest percentage strategic merchandise units in
24 the Walmart business?

25 A. I don't know what this document is.

1 Q. Let's go back to the front page. I'll represent to
2 you, Mr. Rogers, that it's the Walmart stores 10-K report for
3 the fiscal year ending January 31, 2013. P-109.

4 A. Okay.

5 Q. Now we can go back to page 6, the table. Now, the
6 question was, what are the two lowest percentage merchandise
7 segment units in Walmart's business?

8 A. Based on this table, it appears that it is apparel
9 and home.

10 Q. And for home, read across, there's 2011 to the
11 right, 2012, 2013. What are those percentages?

12 A. Starting in 2011 looks like -- you said just for
13 home?

14 Q. Yes.

15 A. 7 percent and then 6 percent in 2012 and 7 percent
16 in 2013.

17 Q. What do you understand that to mean?

18 A. Well, I would assume that this was a table
19 identifying the percentages of sales --

20 Q. Okay.

21 A. -- by segment.

22 Q. What is the largest?

23 A. Appears to be grocery.

24 Q. Isn't it true that in calculating SG&A, the grocery
25 strategic merchandise unit would be more significant in

1 determining the SG&A at 55 percent than would the home
2 department at 7 percent?

3 A. I don't know the answer to that question. I didn't
4 do that analysis.

5 Q. Well, let's make sure we're in the right category.
6 Scroll up to the top of that page in the 2 column. We're
7 looking at the home category. Home includes home
8 furnishings, housewares and small appliances, bedding, home
9 decor, outdoor living and horticulture. This is where things
10 like barbecue grills and so forth are categorized in
11 Walmart's business; isn't that true?

12 A. Appears to be, yes.

13 Q. Let's look at -- just to nail it down, let's look
14 at P-110. This is the Walmart's Form 10-K for fiscal year
15 ending January 31, 2016. And on page 11 of 61. There we
16 are. Again, you'll see the home category is actually in this
17 case taking the 3 years in aggregate. This is actually the
18 lowest, isn't it?

19 A. Yes, looks like it.

20 Q. And so isn't it also true for these three years,
21 2014, 2015 and 2016, and calculation of SG&A taking into
22 account, for example, groceries, that figure would carry far
23 more weight and influence than a calculation for SG&A
24 directed only to the 7 percent in the home category; isn't
25 that right?

1 A. I don't know the answer to that.

2 Q. Why don't you know the answer to that, Mr. Rogers?

3 A. Because my analysis was -- used the lowest level of
4 financial segment data that I was provided. And when I ran
5 the regression, the results showed to be a good statistical
6 fit for regression analysis.

7 Q. When I put that slide D-224 up just before lunch,
8 my observation was, Mr. Rogers, you didn't look that
9 surprised; you simply rattled off the 2 billion-some-odd
10 number. Did you know when I put that slide up there that
11 number was actually over \$200 billion?

12 A. Did I know -- sure, I had that data. I used that
13 data to do my regression analysis, sure.

14 Q. Did you ever tell your attorneys that you were
15 concerned about the size of that data, considering the size
16 of the home and garden area where the barbecue grills reside?

17 A. No.

18 Q. You never discussed that with anybody at Walmart?

19 A. No.

20 Q. Never raised the issue with any of Walmart's
21 lawyers?

22 A. No. My opinion is that the \$910 million is of a
23 significant size that it would cause a change in incremental
24 SG&A.

25 Q. You were asked by Mr. Puzella at an earlier

1 proceeding what data you used. You didn't correct him. You
2 actually followed his lead by telling him that you used the
3 home and garden data, correct?

4 A. That's the best information that I had at that
5 time, yes.

6 Q. Let's look at -- I'm sorry, were you finished?

7 A. Yes.

8 Q. All right. Let's look at P-112. I just want to
9 reference one page. This is page 13 and this is part of the
10 footnote.

11 MR. PUZELLA: Objection, your Honor.

12 MR. ADAMS: I'm going to ask him a question
13 about --

14 THE COURT: How much more of this have you got? I
15 mean, a lot?

16 MR. ADAMS: No, I'm just about finished.

17 THE COURT: Yeah. Overruled.

18 MR. PUZELLA: The objection is --

19 THE COURT: Overruled. Let's get to the end of
20 this and be done with it.

21 Q. (By Mr. Adams) Now, Mr. Puzella -- I'm sorry, Mr.
22 Rogers, I just want you to -- I'll read this for you. This
23 says: When infringement is found to be willful, the district
24 court should give extra scrutiny to categories of overhead
25 expenses claimed by the infringer to ensure that each

1 category is directly and validly connected to the sale and
2 production of the infringing product. Unless a strong nexus
3 is established, the Court should not permit a deduction for
4 the overhead category.

5 Mr. Rogers, can you look at the jury and tell them
6 that in your expert opinion, the data -- the opinions you
7 have given provide the strong nexus and valid connection that
8 this case requires?

9 MR. PUZELLA: Objection, your Honor.

10 THE COURT: Overruled.

11 A. Well, I mean, yes, from an economic standpoint. My
12 position is to identify from an economic standpoint what the
13 variable portions of SG&A, incremental shipping costs and the
14 incremental taxes that would be involved with regards to what
15 the Court or the jury might consider. That's to me -- that
16 calls for a legal conclusion. I'm not here to determine what
17 legal conclusion. I'm here to determine from an economic
18 perspective what those incremental costs are.

19 Q. All right.

20 MR. ADAMS: Just give me one minute, your Honor.
21 (Perusing documents) if you would put up P-111.

22 Q. (By Mr. Adams) Mr. Rogers, does anything in your
23 report provide any information of what the SG&A number would
24 be for the \$910,627,524.65 number?

25 A. I don't understand your question.

1 MR. ADAMS: Would the court reporter please read it
2 back.

3 THE COURT: I don't know that the court reporter
4 can do that, and we don't do that in this court. Ask the
5 question again if you want, if you don't have it.

6 Q. (By Mr. Adams) Mr. Rogers, does any of your data
7 reflect the SG&A only of the amount shown at the bottom of
8 this table 3 which is in your report, \$910,627,524.65?

9 A. I never made that -- I never would have made a
10 calculation of what the SG&A was. I was only identifying
11 what the incremental portions of the SG&A were.

12 Q. As far as your testimony about royalties are
13 concerned, you relied solely on various legal principles that
14 you considered to be relevant based on your understanding of
15 the law, correct?

16 A. No, I relied on my 20 years of experience in
17 conducting reasonable royalty analysis in litigation settings
18 and my 20 years of doing intellectual property valuation and
19 the pricing of intellectual property valuation outside of
20 litigation.

21 Q. Are you a legal expert?

22 A. No, I never claimed to be.

23 Q. Isn't the issue of whether or not royalties in a
24 given case should be paid on a nationwide basis or on some
25 regional basis a question of law for the Court?

1 A. Yeah. I never claimed to say that I have a legal
2 opinion as far as what the damages as far as reasonable
3 royalties should be, which is why I think I talked about it
4 at a couple different levels. My opinion is that it should
5 be limited to those areas where the parties overlap and
6 compete, but the Court may disagree with that.

7 Q. I have one or two more questions. Bear with me.
8 Let's turn back to P-94, what was skipped earlier.

9 Mr. Rogers, this is the report -- I'll represent to
10 you that this is the report that you tendered in the HCW
11 Retirement -- bear me with a second. (Brief pause). This is
12 the expert report you tendered in the HCW Retirement case and
13 I believe you testified in that case was excluded, but you
14 had some reason like it was -- came in too late or something,
15 correct?

16 A. What I testified to was that the attorneys
17 contacted me and asked me to develop a report. Unbeknownst
18 to me is they were trying to submit the report after the
19 discovery deadline.

20 Q. Let's look over at page 4 of this expert report.
21 Home in on the highlighted part. And you -- in your report
22 you understand that RFS was seeking damages related to the
23 value of the ownership of the Hill, Chesson & Woody
24 trademark, logo and slogan, correct?

25 A. I don't particularly remember the details of this

1 case, but it looks like -- that's what it says there.

2 Q. All right. Now let's go over to page 5. Remainder
3 of this report assumes that RFS is indeed found liable.
4 Given the assumption of liability and based on the
5 information that is currently available to me, the following
6 is an estimate of EBS' damages from RFS' alleged bad acts.

7 Then you go through estimated revenues and
8 calculation of defendant's profit. Plaintiff is generally
9 required to identify the revenue directly attributable to the
10 infringement. Do you know what that means? The right to
11 determine directly attributable --

12 A. I have the understanding to mean that the profits
13 that are available for disgorgement, you have to determine
14 how much of that profit would be attributable to the
15 trademark in question.

16 Q. All right. And how do you go about doing that?

17 A. I'm sorry, how do I go about doing that?

18 Q. How do you do that?

19 A. Well, it depends -- every case is fact specific.
20 Every case is different. Lots of times it's done by survey
21 evidence as like there was in this case. Lots of times it's
22 done with -- I think I testified earlier this morning it's
23 conversations with management or engineers to find out how
24 much of profits might be driven by a certain IP versus other
25 assets of a company. It's all fact specific to a particular

1 case and fact circumstances.

2 Q. In this case, down near close to the bottom: With
3 that said, I've undertaken the task of identifying what I
4 believe are RFS' revenues that are as a result of the alleged
5 infringement of one or more of the accused marks. Are you
6 telling us there that you were looking for the revenue that
7 was directly attributable to the alleged infringement?

8 A. No, but I believe that as -- I believe that I was a
9 plaintiff in this case, and so my job as an expert is to
10 identify the revenues associated, and then it's the defense's
11 job to identify any costs or other factors associated with
12 that.

13 Q. So is it your testimony that the evidence of
14 attributableness, if that's a word, is the defendant's burden
15 and not the plaintiff's?

16 A. That's from my experience, yes. I would see the
17 defendants in a report and if there was some issues as a
18 plaintiff that I disagree, then I might issue a supplemental
19 report.

20 Q. All right. So down at the bottom it says: The
21 following table summarizes RFS' sales revenues as reported to
22 the IRS. And here on the next page we see a table headed
23 sales revenue, correct?

24 A. That's what it says, yes.

25 Q. And there are five years each with revenue listed

1 with a total of 1,062,536, right?

2 A. That's correct.

3 Q. And under that you say, it is my opinion, assuming
4 that RFS is found liable, that RFS' revenues associated with
5 the use of one or more of the accused marks is that number in
6 the table. You made no effort to determine whether there was
7 any attributableness to the trademark. You simply added up
8 the gross revenues of the products that were sold with that
9 trademark and that's the data you furnished in your expert
10 report, correct?

11 A. Yes, just like anybody would do from the
12 plaintiff's side of a trademark matter.

13 Q. Now, finally go over to page 16. Almost finished.
14 It is my opinion, assuming that RFS is found liable, that
15 RFS' revenues associated with the use of one or more of the
16 accused marks is that same 1,062,536 number, correct?

17 A. Yes. Can I see -- can you go to the bottom of the
18 page and see what the footnote says?

19 Q. Sure. Do you want to read that to the jury?

20 A. Sure. It says: RFS carries the burden to identify
21 any costs that should be deducted from the identified
22 revenues to determine the profits attributable to the
23 infringement of the trademark.

24 Q. You're talking about the defendant?

25 A. That's correct.

1 MR. ADAMS: No further questions.

2 THE COURT: Any redirect?

3 MR. PUZELLA: Just a few, your Honor.

4 **REDIRECT EXAMINATION**

5 BY MR. PUZELLA:

6 Q. Mr. Rogers, approximately how many times have you
7 acted as an expert in I think you referred to them as complex
8 commercial litigations?

9 A. I think I said earlier about 80 or 90 times.

10 Q. I'm sorry?

11 A. For those that are reported, where I've had an
12 actual report submitted to a Court or deposition testimony,
13 it's about 80 or 90 times.

14 Q. And with respect to your calculations of SG&A, do
15 you believe that you used the best means available to arrive
16 at those calculations?

17 A. Yes, I believe I used the only means available in
18 this case.

19 MR. PUZELLA: Nothing further, your Honor.

20 THE COURT: All right. Thank you. You may step
21 down.

22 THE WITNESS: Yes, sir.

23 (Witness Excused)

24 THE COURT: Do you have any other witnesses?

25 MR. PUZELLA: None for us, your Honor.

1 THE COURT: You rest?

2 MR. PUZELLA: Defendants rest.

3 THE COURT: Do you have rebuttal evidence?

4 MR. ADAMS: We do, your Honor.

5 MR. PUZELLA: I had a housekeeping issue, your
6 Honor. With respect to Mr. Rogers, I need to enter DDX-158,
7 13, 9 and 12.

8 THE COURT: They'll be received.

9 **(Defendant's Exhibit Nos. DDX-158, 13, 9 and 12 received into**
10 **evidence)**

11 MR. PUZELLA: And given closing the defendant's
12 case, I wanted to renew the JMOL motion that we filed
13 previously.

14 THE COURT: Okay.

15 MR. ADAMS: Your Honor, we have just a few exhibits
16 that we need to offer. 88, 89, 90, 91, 92, 93, 95, 97, 98,
17 99, 100, 101, 102, 13, 104, 113, 105, 109, 110, 111 and 94.

18 MR. PUZELLA: Your Honor, we may object to one of
19 those, but I don't know if it's included in that long list.
20 Could we confer with counsel just for a moment?

21 THE COURT: Yes.

22 (Attorney Puzella conferring with Attorney Adams at
23 counsel table off the record)

24 MR. PUZELLA: Based on plaintiff's representation
25 that the document I was going to object to is not included in

1 that list, no objection.

2 THE COURT: You rest?

3 MR. ADAMS: Your Honor, I've been informed I think
4 I skipped over Exhibits 109 and 112.

5 We have one rebuttal witness, I think.

6 (Attorneys Adams and Shaw conferring at
7 counsel table off the record)

8 THE COURT: That's admitted.

9 **(Plaintiff's Exhibit Nos. 88, 89, 90, 91, 92, 93, 95, 97,**
10 **98, 99, 100, 101, 102, 13, 104, 113, 105, 109, 110, 111, 94,**
11 **and 109 received into evidence)**

12 MR. SHAW: We're not moving 112.

13 THE COURT: I can't hear you.

14 MR. SHAW: We have one rebuttal witness.

15 THE COURT: Okay.

16 MR. SHAW: Call Mr. Tem Blackburn.

17 (George Templeton Blackburn, III, having been previously
18 sworn, resumed the witness stand)

19 **DIRECT EXAMINATION**

20 BY MR. SHAW:

21 Q. Good afternoon, Mr. Blackburn. You were here in
22 the courtroom when Mr. David Ortiz testified, correct?

23 A. Correct.

24 Q. And you heard his testimony regarding the purchase
25 of some unbranded grill covers; is that right?

1 A. Yes.

2 Q. And did you have a chance to investigate that?

3 A. Yes.

4 Q. And what did you learn?

5 A. This was part -- well, first to give the context of
6 it. Mr. Ortiz, as I understand it, had gone to our store and
7 had found some of the unbranded grill covers that Walmart had
8 sold in our store being sold with other grill covers that
9 included our Backyard marks, and he was essentially saying
10 that by doing that, we contradicted our contention that we
11 were trying to have an exclusive product, we were just
12 offering exclusive product in our lawn and garden department
13 and here was evidence that we weren't doing that. So I
14 looked into it. And now, you have to remember my original
15 testimony about this whole thing was that coming out of
16 Chapter 11, we were trying to develop strategies to be able
17 to compete with Walmart. One of those was to have exclusive
18 private label goods that we could sell in the lawn and garden
19 department.

20 One of the other strategies that we had was to
21 offer a closeout and deal buys. Closeout and deal buys are
22 when someone has discontinued a product for some reason or
23 another, they're no longer carrying it and some has already
24 been manufactured or some company has gone into bankruptcy
25 and they own a bunch of inventory, and you can buy it for

1 much less than you can buy it from the manufacturer and
2 therefore you can sell it.

3 It's a deal buy because you're getting a special
4 deal on it and you can thereby sell it to your customer much
5 cheaper than you yourself can buy it from on a regular basis,
6 and that's exactly what this was.

7 And one of the ways that distinguishes us from
8 Walmart is that we understand that because of the size of
9 Walmart, deal buys just wouldn't work for them, and we're not
10 aware that they do deal buys or closeouts, and that's because
11 a closeout by its very definition is just some limited
12 quantity of goods left over somewhere.

13 And so in this case, we bought 69,000 units of
14 these covers that were unbranded and we bought them for \$2
15 and something, and we sold them to our customers for \$4.99
16 each. So I went to Walmart to see what it sold those same
17 items for and in their store -- I went to the one here in
18 Elizabeth City. In their store they're offering covers from
19 22 inches wide to 72 inches wide for \$9.97 to \$19.97. These
20 covers we were offering were 55 inches wide, 60 inches wide,
21 65 inches wide. So they were larger than the 22 inches but
22 smaller than the 72 inches, but we were offering them to our
23 customer for \$4.99, which was about half the cheapest one you
24 could buy, comparable one you could buy at Walmart. So
25 that's one of the ways that we distinguish our -- our stores

1 from Walmart. We're able to offer our customers that kind of
2 deal.

3 Q. Mr. Blackburn, when Variety purchases the
4 closeouts, does it enter into a contract with the party it's
5 buying the closeouts from?

6 A. In the sense of having a purchase order and then
7 receiving the goods. Of course, in these circumstances what
8 you want to be sure of is that the original owner of those
9 goods, the retailer for whom they were manufactured has given
10 permission. So we bought them from a jobber. The jobber had
11 a letter from Walmart saying that they could sell these --
12 resell these goods.

13 MR. SHAW: May I approach?

14 (Attorney Shaw providing document to opposing counsel
15 and to the witness)

16 Q. (By Mr. Shaw) Mr. Blackburn, I'll hand you what's
17 been marked as Plaintiff's Exhibit 115. Do you recognize
18 this document?

19 A. Yes.

20 Q. Is this the letter that you just described?

21 A. Yes.

22 Q. And can you explain to the jury what this means?

23 A. Well, just to get to the meat of it, it says this
24 letter confirms -- it is addressed to Allen Company, Inc.
25 That's who we bought them from. This is on Walmart

1 letterhead purportedly signed by an authorized person at
2 Walmart. And it says -- this letter from Walmart confirms
3 our agreement authorizing you under the terms and conditions
4 of this agreement to sell certain unbranded grill covers to
5 other retailers due to the excess deleted inventory that
6 exists. And then it goes on to tell what kind of special
7 terms and conditions they're asking them to agree to.

8 Q. And this is a document that Variety has in its
9 ordinary course of business?

10 A. Yes.

11 MR. SHAW: Your Honor, we would move P-115 into
12 evidence.

13 THE COURT: Received.

14 **(Plaintiff's Exhibit No. 115 received into evidence)**

15 Q. (By Mr. Shaw) Mr. Blackburn, one final question.
16 Was there anything to suggest that purchasing closeouts that
17 were unbranded products from Walmart is somehow nefarious in
18 any way?

19 A. No. It gives a good deal to our customers. It was
20 authorized by Walmart to be done. And of course, what would
21 have been underhanded is if we bought the deal buy and sold
22 it to our customer at the same price that we have to charge
23 because of the higher cost of the goods on a regular basis,
24 but we didn't do that. We bought it for \$2 and sold it for
25 4.99, so our customer got a great deal.

1 MR. SHAW: Thank you. No more questions.

2 THE COURT: Any cross?

3 MS. GARKO: A couple questions, your Honor.

4 **CROSS-EXAMINATION**

5 BY MS. GARKO:

6 Q. So Mr. Blackburn, just so we're on the same page.
7 The products we're talking about were in fact Walmart
8 products, correct?

9 A. Correct.

10 Q. And when Variety bought them, they knew that they
11 were Walmart products, correct?

12 A. Yes.

13 Q. Variety got this letter?

14 A. Correct.

15 Q. Saying they were Walmart products, right?

16 A. Yes.

17 Q. And Rose's sold them on its shelves, correct?

18 A. Correct.

19 Q. In the same area where all its Backyard products
20 are sold, correct?

21 A. Correct.

22 Q. And Variety elected to sell them because it was a
23 good deal for their customers, right?

24 A. Correct.

25 Q. They thought their customers would buy them,

1 correct?

2 A. Correct.

3 Q. Even with no name on them, correct?

4 A. We -- because of the price.

5 Q. They had no name on them, correct?

6 A. They had no name on them.

7 MS. GARKO: I don't have anything further.

8 THE COURT: Thank you. You can step down.

9 That it for you?

10 (Witness Excused)

11 MR. ADAMS: It is, your Honor.

12 THE COURT: You rest?

13 MR. SHAW: We do.

14 MR. PUZELLA: Renew our JMOL.

15 THE COURT: Yes. Okay.

16 Ladies and gentlemen, let me excuse you back to
17 your jury room. You've heard all the evidence in the case.
18 Next thing will be the closing arguments. We'll come back in
19 a few minutes.

20 (Jury out at 2:28 p.m.)

21 THE COURT: Hand this to the lawyers to look at.

22 And then give it back to me.

23 MR. ADAMS: Your Honor, very briefly, plaintiff
24 moves to exclude the testimony and report of Mr. Graham
25 Rogers. It's quite clear from the testimony of Mr. Rogers

1 that his report has virtually nothing to do with the issues
2 in this case. Leaving aside the question that he testified
3 falsely about his prior expert history, this report should
4 not be in evidence. The jury should not be allowed to
5 consider the testimony that relates to the entire gross
6 revenue of Walmart when we're dealing with something that
7 only comprises .09 -- 8 percent of Walmart's revenue.

8 THE COURT: Denied. You brought all that out on
9 impeachment. I think the jury has a fair assessment of it.

10 Well, I'll give the plaintiff's proposed jury
11 instructions except for the deterrence language, and you can
12 argue the case -- that will be the issue sheet. We'll come
13 back in about 15.

14 MR. HOSP: Your Honor, for the record --

15 THE COURT: I'm trying to get out of here.

16 MR. HOSP: And I understand that and I will take
17 less than a minute, I promise. With respect to the verdicts
18 sheet, we object to the extent that we believe there should
19 be a separate instruction on causation.

20 THE COURT: No. That's covered by the first trial.
21 I'll deny that.

22 MR. HOSP: In addition, with respect to the
23 plaintiff's instructions, we believe that those instructions
24 would fail to instruct the jury first that Variety cannot
25 receive both a royalty and Walmart's profits; second, that

1 Walmart's profits can only be awarded as compensation, not a
2 penalty; third, regarding the computation of available
3 profits; fourth, regarding Walmart's right to profits
4 portion -- the portion of its profits not attributable to the
5 use of Backyard Grill; fifth, regarding the categories of
6 cost that Walmart may prove should be deducted from its
7 profit. We believe that there should be a limiting
8 instruction based on Variety's emphasis on deterrence as a
9 basis for the award in its opening and presentation of the
10 evidence.

11 With respect to royalties, we believe that those
12 instructions fail to instruct the jury on Variety's burden
13 first to show that Walmart's conduct actually caused
14 Variety's harm in the form of lost royalties. Second, they
15 fail to show the royalty it seeks is rationally related to
16 Walmart's use of Backyard Grill. Third, fails to advise the
17 jury to show a reasonable possibility that Walmart would have
18 taken and Variety would have granted a royalty. Fourth, to
19 prove a royalty amount with reasonable certainty, as we've
20 also already covered. We do understand your Honor would be
21 dealing with the Synergistic factors. We believe that the
22 jury should be instructed that they should consider those
23 factors as well.

24 THE COURT: All right. Thank you. Denied.

25 MR. SHAW: Your Honor, sorry. I apologize. One

1 last question. The general instructions that the Court gave
2 at the first trial, it will give those again and as well as
3 the legal instructions --

4 THE COURT: I'll reference them. I'm not sure I'm
5 going to give them all.

6 MR. SHAW: We would ask the instructions the Court
7 gave previously regarding impeachment be given again.

8 THE COURT: I'll talk about that.

9 (Recess at 2:32 p.m. to 2:47 p.m.)

10 (Jury in at 2:47 p.m.)

11 THE COURT: Ladies and gentlemen, you've heard the
12 evidence on this issue of damages. There are two questions
13 that you'll have to answer: The question of whether profits
14 were gained on this that need to be disgorged and whether a
15 license or a royalty should be paid. Those are the two
16 issues that the parties are still in contention over. The
17 burden of proof is on the plaintiff to prove by a
18 preponderance of the evidence that what they claim is more
19 likely true than not true, and so they have to satisfy you on
20 the issue of damages with proof by a preponderance of the
21 evidence. Because of that, the plaintiff will go first with
22 their opening statement, and then you'll hear from the
23 defense and any rebuttal from the plaintiff, and I'll give
24 you some final instructions.

25 You've done this before, so this is how it goes. I

1 know you remember that. Thank you. Jury can be with the
2 plaintiff.

3 MR. ADAMS: Thank you, your Honor.

4 **CLOSING ARGUMENTS**

5 (By Mr. Adams)

6 Well, you've heard me say this before and I'll say
7 it once more. Jury duty is an important responsibility and
8 we're grateful to you being here and your attention, and no
9 case proves that fact better than this case.

10 You will soon decide two issues. You've heard his
11 Honor tell you what they are, and there's no question but
12 what these are big numbers. The question is how do they ever
13 get so big.

14 This trademark dispute goes back almost an entire
15 decade. During that entire decade Walmart refused to hear
16 anything that it did not want to hear. Walmart refused to
17 listen to its own lawyers when they told them that Variety
18 had an incontestable trademark registration, a nationwide
19 trademark registration. Walmart refused to listen when
20 Variety specifically objected to Walmart's infringement of
21 its Backyard trademark. Walmart refused to listen when
22 Variety filed this lawsuit way back in 2014.

23 Instead, Walmart kept right on selling more and
24 more and more infringing Backyard products, in fact
25 \$770 million worth, after it was put on express notice of

1 Walmart's (sic) objection. That's out of a total of
2 \$911 million, which you see up here on the board. Almost
3 \$911 million. Well, I think Walmart is quite likely to
4 listen carefully to what you say a few moments from now.

5 Last October, sitting where you now sit, you heard
6 several days of testimony. And when all that testimony was
7 done, arguments and instructions from the Court were done,
8 you unanimously decided that Walmart was guilty of infringing
9 Variety's Backyard trademark and that that infringement was
10 willful, and we all know what that means.

11 So this is a simple case really. It's open and
12 shut. And I think that's evidenced by the fact that this has
13 not been a long trial. Neither one of them has. We were
14 here a little over 2 days back last October and we've been
15 here less than 2 days this time. So the facts are
16 essentially undisputed. That includes the money, the
17 revenue, the cost and so forth.

18 So let's look at this rather quickly. The dominant
19 part of both trademarks, Backyard is the same. The goods and
20 services offered by Walmart and Variety Stores are the same.
21 Walmart had specific knowledge of Variety's rights when it
22 infringed, substantial evidence of actual confusion from
23 Walmart's own survey experts.

24 In contrast, Variety did everything the right way.
25 It registered its trademark with the Trademark Office so that

1 to inform the world of its important nationwide trademark
2 rights. It used the circle R on its Backyard branded
3 products to further inform anyone seeing its products that
4 its important trademark rights were protected by law.

5 In contrast, Walmart did everything its own way,
6 without regard to the law and without regard to the rights
7 granted Variety under The Backyard trademark laws. Walmart
8 learned early on of Variety's The Backyard trademark
9 registration when its lawyers searched the Trademark Office
10 files. Ms. Dineen testified there were reasons why it was a
11 good trademark. It resonated with customers, hit the right
12 price point. The Luci surveys, which you saw some of those
13 surveys, showed it ranked quite a bit higher than Walmart's
14 Mainstay trademark that it was then using on its grilling
15 accessories.

16 Here's the question. If according to Walmart The
17 Backyard trademark really doesn't matter, then why didn't
18 they take the Mainstays trademark that they clearly owned and
19 where it had been using it on the grilling accessories and
20 likely had acquired some distinctiveness, why didn't they
21 take that and put it on the grills? No answer to that
22 question, either in October or now.

23 So now Walmart has brought back four of the
24 witnesses you heard last October. And I told you yesterday
25 that they were going to come back for a do-over, and that's

1 exactly what they did. The vast majority of the testimony
2 you heard from Ms. Dineen, from Mr. Ortiz, Mr. Van Liere,
3 exactly what you heard last October. And I would have to
4 assume that you found that that testimony was unreliable and
5 unconvincing. Otherwise, you would not have filled out the
6 verdict form in the way you did. So I don't intend to
7 address what happened in October in any detail. That's --
8 that was done and dusty, as the saying goes.

9 However, there are a few things that are not
10 mentioned -- that were not mentioned that perhaps you should
11 recall. For example, Ms. Dineen testified not yesterday but
12 last October that they decided not to use Backyard after it
13 learned of a third-party registration, but remember, she
14 couldn't remember anything about that third-party
15 registration. When I pressed her on it, they finally
16 conceded, well, yeah, this is, word in quotes, potentially,
17 close quotes, that user could have been Walmart itself. Now
18 we know it was.

19 MR. SHAW: Could have been Variety.

20 MR. ADAMS: Could have been Variety itself. I do
21 this all the time. Now we know it was.

22 Now, 4 months later Ms. Dineen avoided mention of
23 this critical fact. If there had been any other user of
24 Backyard, Walmart had 4 months to rediscover who it was. It
25 could have come in, papered over their mistakes in October,

1 and who knows what might have happened. They don't do that.
2 The reason they didn't do that is they're unable to do it.

3 In fact, what happened, as we discussed last
4 October, was that Walmart's attorney did discover Variety's
5 actual use on grills and after discussions with Walmart's
6 marketing people, Walmart decided to use it anyway because
7 the Grill Master license we've heard so much about had fallen
8 through and Walmart was in a time crunch.

9 Now, all this testimony amounts to a claim by
10 Walmart that after all, The Backyard trademark is worthless.
11 And therefore, notwithstanding all the facts that you've
12 heard that convinced you in October that they infringed and
13 that infringement was willful, they simply say put two big
14 fat zeros in the form and let's just go home.

15 Mr. Puzella told you at least twice to ignore human
16 nature and perception and essentially not to use your common
17 sense. He wants you to let Walmart off the hook by arguing
18 that customers did not buy the product solely because of the
19 trademark. He wants to discredit The Backyard trademark by
20 arguing The Backyard trademark was not important to Walmart.

21 But all this means is that Walmart does not respect
22 intellectual property rights unless The Backyard trademark
23 happens to belong to Walmart. And you can be sure that
24 Walmart's position on these matters is entirely different
25 when it's their trademarks that are being infringed.

1 So if the trademark did not matter, why did Walmart
2 invest so much time and effort to select a trademark if the
3 trademark didn't matter? Why didn't Walmart stop when it had
4 the chance? If The Backyard trademark did not matter, why
5 did Walmart sell \$750 million more products after they were
6 put on explicit notice they were infringing? If the
7 trademark didn't matter, why did Walmart rename their product
8 to Expert after selling a no-name product? That doesn't
9 sound like someone who doesn't think trademarks are
10 important. If the trademark did not matter, why did Mr.
11 Ortiz testify they, quote, built a brand, close quotes?

12 Nobody from Walmart offered any opinion on the
13 value of The Backyard brand. The only testimony on brand
14 value was from Mr. Blackburn, and he is the best person to
15 give you that opinion. The value of Backyard is not
16 determined by whether customers only buy products based on
17 The Backyard trademark, and let me give you perhaps an overly
18 simple example.

19 But let's say that someone goes into a drugstore
20 and walks up to the counter where the toothpaste is being
21 sold and they ask the first 100 people that walk up to buy a
22 tube of toothpaste, why are you buying that toothpaste? My
23 guess is that 99 or 100 of those people are going to say
24 something along the lines of, well, I use it to brush my
25 teeth. Not one person is going to say, man, I just love that

1 Colgate trademark. And I walk up to the counter and look at
2 Colgate on the shelf, I get shivers up my spine.

3 That's ridiculous. That's not what trademarks are
4 for. Trademarks are signals. Trademarks -- we went over
5 this in October. Trademarks are signals that allow you to
6 determine what you want to buy and what you don't want to
7 buy. And you can imagine -- well, let's back up.

8 What would Colgate's view be if the law said that
9 it's perfectly okay to have two or three Colgate toothpastes,
10 same package, same name, but different companies and
11 different quality? That something you would want to live
12 with? Multiply it times 10,000 for every product and service
13 you may use in a given year. No.

14 So the whole argument that somehow The Backyard
15 trademark is worthless because people don't buy products
16 because of trademarks is just silly. They use The Backyard
17 trademark for another purpose. They use it to locate the
18 product they want and then buy the product that has the
19 desirable characteristics that they want.

20 So here we get to the question of profit
21 disgorgement, and this is important. Nothing in the law
22 requires proof of a trademark itself to drive sales. And in
23 many cases it doesn't. The law is rather to protect owners
24 against others' use of the trademark without permission, and
25 even more importantly, to protect the public. Mr. Blackburn

1 testified that all profits should be disgorged so Walmart
2 doesn't receive a benefit from its willful infringement.

3 Walmart's evidence is -- sorry -- Variety's
4 evidence is straightforward and reasonable. Here's the
5 information that you need to rely on. Walmart's gross
6 revenue -- we've been over this before. Walmart's cost of
7 goods, Walmart's gross profit. Walmart asked you to give
8 them a free pass. So what does Walmart attempt to do? Well,
9 they called Mr. Rogers to the stand. And we'll have
10 something more to say about him a little later.

11 But Walmart is really asking you to allow a
12 situation where a large company who does business nationwide
13 can pick off local regional companies by claiming that, well,
14 we may be liable, if at all, in the area where we compete,
15 but we want all the profits from the rest of the country, not
16 realizing -- or maybe they do realize -- that by the time a
17 company gets to the other part of the country where they want
18 to do business, The Backyard trademark is -- essentially
19 belongs to someone else or has even been destroyed. What
20 stronger encouragement to infringe could you give a large
21 nationwide company like Walmart than to allow them to steal a
22 small regional competitor's trademark and then use it for
23 free?

24 Mr. Blackburn you heard last October provided a
25 reasoned, balanced and completely professional explanation of

1 why he thinks Variety was entitled to a royalty. This is
2 called a hypothetical negotiation. He came to the
3 conclusion, and that's not surprising I don't think, that
4 10 percent based on Walmart sales would be reasonable.

5 But reasonableness has a circumstance to it.
6 Reasonable might be another number, a lower number, if
7 Walmart -- a much lower number if Walmart had come to Variety
8 in 2011 and said, let's negotiate a license agreement. But
9 is that same low rate reasonable under these circumstances,
10 where they've sold \$910 million worth of infringing goods? I
11 don't think so, but you're going to have to make up your mind
12 about that.

13 Mr. Blackburn's analysis is also supported by Dr.
14 Poindexter, who testified as an economist about how a
15 reasonable royalty would be determined from a commercial
16 economic view. Now, admitted, there's variations in Dr.
17 Poindexter's conclusion and Mr. Blackburn's conclusion and
18 that's not -- that shouldn't be surprising. This is merely
19 evidence that both were giving their best opinion objectively
20 and not simply marching in lockstep like all of Walmart's
21 witnesses. Dr. Poindexter provides a range of between 5 and
22 10 percent. This is his independent analysis, not something
23 he was paid to conjure out of thin air. So you don't have to
24 decide based on your own good judgment how to determine the
25 correct royalty amount.

1 Now, I'm going to let Mr. Puzella talk to you now,
2 and we'll learn together how Walmart justifies to you and the
3 Court its wilfully infringing behavior in this case and why,
4 in Walmart's view, they should have to pay nothing for its
5 willful infringement.

6 THE COURT: The jury can be with the defendant for
7 closing argument.

8 MR. PUZELLA: I'm sorry, I couldn't hear you.

9 THE COURT: I said the jury can now be with the
10 defendant for closing argument.

11 MR. PUZELLA: Thank you, your Honor.

12 **CLOSING ARGUMENTS**

13 (By Mr. Puzella)

14 Good afternoon. The first thing I would like to do
15 is to thank you for your service. We really appreciate the
16 work that you put in and the fact that you come back and
17 you've listened to us for another 2 days. We sincerely
18 appreciate it.

19 I want to take you back to yesterday's opening and
20 compare the parties' statements about what the evidence would
21 show and compare that to what you actually saw and heard.

22 I told you that Walmart would demonstrate the
23 absence of a causal connection between its sales and profits
24 and its use of the term Backyard Grill in its products. Why?
25 Because if Walmart's sales were not caused by the use of the

1 Backyard Grill mark, then there's no basis to award Variety a
2 royalty for that mark. Because that award is only related to
3 Walmart's sales. And if Walmart's sales were not caused by
4 the use of its Backyard Grill mark, then there is also no
5 basis to give Variety Walmart's profits. Because they have
6 nothing to do with the use of the trademark.

7 We delivered on my promise to show that Walmart's
8 sales and profits were not caused by or attributable to the
9 use of the Backyard Grill mark. Specifically, Ms. Dineen
10 showed you Walmart's prelaunch survey evidence. She walked
11 through the survey evidence with Mr. Hosp, demonstrating that
12 before they launched the product, they didn't believe that
13 the name was going to be the thing to drive sales. That was
14 before this litigation, before they even knew about Variety.
15 When you go into the jury room, that's Exhibit D-206.

16 Ms. Dineen also showed you internal Walmart
17 documents from the spring of 2012 that showed the results of
18 their thinking and their research on the effect of the use of
19 the name. Was it going to cause sales to go up? Were people
20 going to buy the product because of the name? Again, before
21 the litigation, the internal research showed there was no
22 connection.

23 And Mr. Ortiz testified that in his experience
24 shoppers at this price point, the opening price point, the
25 lower-priced product, shop based on value. They don't shop

1 based on name. If you're looking to buy an expensive grill,
2 you might look for the name like Weber. But if you're trying
3 to buy a less expensive grill, you're looking for features
4 and price. That just makes sense. And he also told you that
5 once Walmart started selling product with no name on it,
6 sales stayed the same. That is real-world evidence that the
7 name is not the thing that sells the product. If the name is
8 not the thing that sells the products, then the sales and the
9 profits are not attributable to the use of the name. So
10 there's no basis to give any of that money to Variety.

11 Finally, Dr. Van Liere testified about his study.
12 He testified that he tested the specific question about what
13 consumers care about when they're buying these type of
14 products. Brand was at the bottom of the list. Bottom of
15 the list. His study supports all of the actual evidence.

16 Now, in his opening, Mr. Adams told you that
17 Walmart's argument that Backyard Grill didn't cause its sales
18 and profits was sour grapes. Do you remember the story about
19 the fox? What he was trying to imply was that Walmart's
20 offering nothing but after-the-fact excuses to get out of
21 paying. That was the point of that story.

22 But think about the evidence I just walked through.
23 Two pieces of evidence predate this entire litigation. It
24 can't be after the fact. It's impossible. And the other
25 evidence is fact based. The sales didn't go down. You've

1 heard no contrary evidence. And the survey shows what it
2 shows. You've heard no contrary evidence there either.
3 Variety didn't submit a survey to the contrary. Doesn't
4 exist.

5 So on this question, the evidence is entirely
6 one-sided. There's no evidence from Variety showing that
7 there's a cause -- causal connection rather between Walmart's
8 use of Backyard Grill and the profits that it earned.

9 What did Variety do instead on this issue? It
10 engaged in what could charitably be called a bit of
11 misdirection. Immediately after my opening, Mr. Blackburn
12 went on the stand and he was asked repeatedly whether he
13 believed that Walmart caused Variety harm. He referenced my
14 opening. He said that the causation that Mr. Puzella was
15 talking about. Do you remember that? That's misdirection.

16 That's not the question I posed at all. The
17 question I posed was whether Walmart's profits were caused by
18 the use of Backyard Grill or caused by quality of the
19 product, the features of the product, or price or something
20 else. That's the question. So that was just a bit of
21 misdirection. If you think about that, you'll realize that
22 there is literally no evidence from Variety that shows us
23 anything about whether Backyard Grill caused Walmart's
24 profits.

25 Now, before I talk to you about the evidence on

1 royalty and profits, I want to talk to you a bit about
2 witness credibility. The Judge told you a couple of times
3 that it's up to you to determine who to believe, who not to
4 believe. Who do you find credible?

5 Now, Variety offered two witnesses. Neither of
6 them offered credible testimony. Mr. Blackburn had never
7 negotiated a completed license agreement in his entire
8 career. Yet he sat up there and told you, oh, this is what
9 it would have been. He offered one side of what this
10 hypothetical license and negotiation would look like. He
11 didn't offer any testimony about how Walmart might counter in
12 that hypothetical negotiation. You didn't hear it.

13 Instead, he testified that you should award a
14 10 percent royalty. Which is double, double -- that's a lot
15 of money. The board is no longer up there, but it's a lot of
16 money. It's double what Variety's own expert says is the
17 right amount. And what was his basis for that? It was a
18 book that he never read before this case. He never heard of
19 it before this case. Variety's lawyers gave it to him. That
20 was it. He just plucked 10 percent out of the air.

21 And you'll remember that the 10 percent that he
22 plucked out of the air in that book was for things like
23 events like the Super Bowl or for celebrities. Backyard
24 Grill isn't similar to those sorts of things. It doesn't
25 give you a reason; it doesn't give you evidence that

1 10 percent is the right amount. So his testimony on those
2 issues just isn't credible. He was just offered as someone
3 who could throw a number out there and see if you liked it.
4 That's about all that happened.

5 And as for Professor Poindexter, Variety's expert,
6 he was perfectly comfortable testifying about his baseless
7 assumptions under oath. He told you that Walmart had to take
8 a license from Farberware for a toaster because it didn't
9 have permission to sell a particular toaster and they agreed
10 after the fact to a high royalty number. And he told you
11 that that was an example of Walmart having its hand in the
12 cookie jar. Do you remember that?

13 Then Ms. Dineen gets up on the stand and talks
14 about the same documents and says that's not at all what
15 happened. Not at all what happened. None of those products
16 had even been packaged yet. We hadn't sold one of them, and
17 we talked to our partners at Farberware and we agreed to a
18 license.

19 That wasn't Walmart with its hand in the cookie
20 jar. Yet Professor Poindexter was perfectly happy to read
21 that document and draw all sorts of assumptions and testify
22 to you about those assumptions under oath.

23 He also testified about an e-mail about Grill
24 Master, and based on that e-mail he told another wild story
25 about Walmart needing to get this deal done soon. Do you

1 remember that language in the e-mail? And then Ms. Dineen
2 gets on the stand and says, that's not at all what that
3 e-mail was about. That language referred to the second part
4 of the e-mail regarding Rival, the brand Rival, and other
5 products altogether, not grills.

6 So again, he was willing to read Walmart's
7 documents and tell you what they meant when he knew nothing
8 about what they meant. That's what speaks to his
9 credibility.

10 Now, Mr. Poindexter's performance on cross-
11 examination was also notable. And you saw how he responded
12 to my simple yes-and-no questions. I don't think I need to
13 say much more about that.

14 Now, if you find that some portion of Walmart's
15 sales are due to the use of the Backyard Grill mark -- I
16 don't think you should. You should find no causation and put
17 zero in both spots in the verdict form. But if you do find
18 some connection and you do think that some portion of the
19 profits are due to the use of the mark, you need to consider
20 royalty and the profits.

21 Let me talk about royalty first. On royalty,
22 Variety has the burden to prove to you an entitlement to the
23 royalty, that they lost out on royalty payments and the
24 amount, the percentage. I can offer no evidence on that and
25 sit down. I didn't do that, but that's what I could do. So

1 Variety has to show you, they have to prove to you, that
2 they're entitled to a royalty.

3 What's the testimony? What's the evidence there?
4 Variety had never licensed its mark to anyone at any time
5 ever. Mr. Blackburn in his career had never negotiated a
6 completed license agreement. There's no history from which
7 you could conclude that they lost some royalty because their
8 policy, their corporate policy, was not to license it. So in
9 what universe would there have been a license; would there
10 have been something they say they lost? There's none.

11 And the second question on the percentage, the
12 second question that they have to prove, all you did was hear
13 from Mr. Blackburn which was 10 percent, and I've discussed
14 that it was basically no basis for it at all, and 5 percent
15 from Mr. Poindexter. Let's talk about -- I'm sorry,
16 Professor Poindexter.

17 Let's talk about Professor Poindexter's analysis.
18 And I struggle with that word because it's not an analysis.
19 He looked at a book, and the book had a range of 4 to
20 6 percent. I asked him on cross-examination, do you know
21 anything about the trademarks that can cause the authors of
22 the book to put that range of 4 to 6 percent in there? And
23 he said, no, I don't.

24 So he doesn't know whether that's 4 to 6 percent
25 for a brand like Weber or 4 to 6 percent for a no-name brand

1 or some regional brand we know nothing about. There's
2 nothing behind that number that allows you to make the
3 comparison that you need to make to have a justification for
4 a number.

5 And you remember our expert, Graham Rogers,
6 described how it's the equivalent of looking at the Kelley
7 Blue Book and just looking up "truck" and not going behind
8 that to say, well, I have a new Ford F-350 with 10,000 miles
9 and it's mint, that price is going to be here. Or I have a
10 20-year-old beater with bald tires, that price is going to be
11 here.

12 You need to know what you're looking at to be able
13 to pick a proper number. Mr. Poindexter -- I'm sorry,
14 Professor Poindexter didn't do any of that.

15 And importantly, Mr. Rogers explained how this
16 isn't a complete analysis and it's not something he relied
17 on, and you heard the cross-examination of Mr. Rogers. It
18 was an hour long. I don't know how long it was. There was
19 maybe a minute or two on royalty. They didn't even approach
20 the royalty issue with Mr. Rogers, so his testimony
21 effectively goes in unrebutted.

22 Now, Mr. Poindexter also relied on various license
23 agreements that Walmart had with other companies. There are
24 a host of problems with using those as comparables. And when
25 you're in the jury room, look at DDX-12. That was Mr.

1 Rogers' chart that showed the terms of the various license
2 agreements with General Electric, Better Homes and Gardens,
3 Snapper, Farberware, Sunbeam, all those folks. None of the
4 license agreements are with Variety. None of them are for
5 the Backyard mark. So that by itself tells you that they're
6 not comparable. But beyond that, all the license agreements
7 are for household names. They're brands that you all know,
8 General Electric, Farberware, all those brands. You know
9 them. You know they're enormously valuable. They're not the
10 equivalent, so it's different.

11 The number of trademarks that are licensed in those
12 agreements are different. Some of them are exclusive
13 licenses. Some of them are nonexclusive licenses. How can
14 it be both? How can you use a combination of that attribute
15 in a comparison? It's either some or the others, but he
16 includes both. And when you look at the economic terms in
17 those various license agreements, they're all over the map.
18 But importantly, the great majority of them are for like 1,
19 2, 3 percent for these famous national brands. Yet Mr.
20 Poindexter wants 5 percent and Mr. Blackburn wants
21 10 percent. General Electric doesn't get 10 percent. Think
22 about that when you're trying to suss out who has provided
23 you with real evidence about how to pick a number.

24 So at the end of the day when you think about
25 reasonable royalty, you should conclude that Variety hasn't

1 given you enough evidence to arrive at an appropriate number
2 even if they're entitled to a royalty.

3 And finally on profit. The causation issue comes
4 back in here as well, right? If the profits aren't
5 attributable to the use of the mark, then the profits
6 shouldn't be disgorged because there's no relationship
7 between them.

8 Now, Variety has no evidence that its mark is known
9 outside of the areas where it actually sells its product.
10 You have heard none. We have no evidence that Variety's
11 Backyard mark is known in California or Utah, Montana, Texas,
12 places where people buy and sell a lot of grills.

13 You have no evidence beyond the fact that they sell
14 in 16 states, and you heard Mr. Rogers tell you that in some
15 states how do you give them the whole state because they're
16 in one small area over here and another small area over here.
17 Walmart is all over the place, right? So think about it.
18 Does it make any sense that a Walmart store 6 hours away from
19 a Variety store competes with Variety for a \$30 grill? Of
20 course not. That doesn't make any sense.

21 So when you're looking at a profit analysis --
22 again, it should be zero because there's no causation, but
23 Mr. Rogers gave three different breakdowns. He gave you
24 breakdown at a 50-state level, at a 16-state level and a
25 25-mile level. If you look at any of them, it's the 25-mile

1 level. That's DDX-11. That's the profit calculation that
2 you should look at if you're going to consider any profit
3 calculation.

4 And then the next one, 16 states, is DDX-10.
5 That's the next one to look at.

6 There's no basis for you to look at DDX-9, which is
7 all 50 states. There isn't a universe where Variety lost out
8 on a sale of Walmart's sales of grills in California. There
9 was no cross of Mr. Rogers on this geographic scope issue.
10 You didn't hear it. They didn't touch that issue.

11 Professor Poindexter conceded he didn't do a
12 geographic scope analysis. He just didn't do it, so you
13 didn't hear from him either. So that leaves you with what's
14 the evidence. Well, the evidence is what Mr. Rogers
15 testified to.

16 Now, when you look at those profit calculations,
17 they may appear daunting but they're really not. There's
18 revenue, and from that there's a deduction of cost of goods
19 sold, and that gets to a gross profit number. Dr.
20 Poindexter, Variety's expert, agrees that that's at least the
21 right number. Mr. Rogers says you have to deduct some other
22 costs as well.

23 Now, this is important. Dr. Poindexter agrees with
24 Mr. Rogers that you deduct variable costs and that what
25 you're trying to disgorge is incremental profit. So the

1 other costs that Mr. Rogers deducts, shipping, a portion of
2 SG&A and taxes, you heard Mr. Rogers, those are variable
3 costs. So Mr. Poindexter agrees that if they're variable
4 costs, they should be deducted. And it's the bottom line
5 incremental contribution of profit that matters. The only
6 cross-examination you heard on those further deductions by
7 Mr. Rogers was about half an hour on SG&A. They didn't talk
8 about shipping, didn't talk about taxes. And you heard the
9 evidence. It's fresh in your minds, so you can decide
10 whether SG&A is appropriate. Mr. Rogers testified he used
11 the best means available to perform that calculation and he
12 did it as he had done in other cases.

13 So when you go into the jury room, keep in mind
14 that you can only award money as compensation. You can't
15 award money here to punish. It can only be compensatory.

16 Now, at the beginning I told you that you had a
17 challenge. I think you're up to that challenge. Weigh the
18 evidence, weigh the witness credibility, and when you do, I
19 have faith that you'll enter zero in both places on the
20 verdict form.

21 Thank you.

22 THE COURT: All right. The plaintiff can have
23 rebuttal.

24 ///

25 ///

REBUTTAL CLOSING ARGUMENT

(By Mr. Adams)

Let's talk about profits for a minute. You know, I'm not sure quite what to make of Mr. Rogers. I'm actually reluctant to give his testimony the respect that even a passing mention would merit. But what happened here? He came in, took an oath to tell the truth in this room, a room dedicated to truth and fairness and justice. What did he do? I pointed out to him in two prior instances he had testified under oath that he was not aware of one case he knew a report of his had ever been stricken. None of his testimony had ever been stricken. When I pointed out six different examples.

That's not the end of it by any means. He had excuses for every one. But the fact remains that he testified that his reports had never been excluded, and at least 6 had been. And you saw terms like -- you saw Judge's -- in the Polyzen case, for example. His report and testimony, deeply flawed. Calculations based on assumptions unconnected to the existing evidence. Granted the motion in limine to exclude his testimony. Testimony ignores the Court's order of February 18. Testimony is not tied to the facts of the case and is irrelevant and unreliable.

The HCW case. Court prohibited Mr. Rogers from offering testimony, argument or other evidence regarding his

1 opinions and conclusions about damages.

2 In Miller, he realized he made a mistake. He
3 didn't catch it until the day before trial. And so when the
4 Judge excluded that report, they tried to go back and
5 convince the Judge that his original report that had the
6 mistake was after all okay. The Court refused to accept it.
7 It was appealed; Court's decision was upheld.

8 Electro-Mechanical. He gave an opinion that his
9 client was entitled to \$491,000. The Judge didn't agree.
10 21,000.

11 In ESCgov he offered an opinion that intellectual
12 property assets were worth over \$2 million. His letter
13 didn't list or clearly identify the intellectual property.
14 Contract award was \$62,000.

15 In the INVUE case the report prepared by Rogers
16 provided virtually none of the information required by Rule
17 26.

18 It's a pattern which you've seen here. He admitted
19 that there was one mistake he had made, that he caught it
20 himself and he corrected it. But, you know, the significant
21 thing about this is that this actually is not a Rogers
22 mistake, at least not the first one. You know who made the
23 big mistake, don't you? Walmart. They're the ones that gave
24 him a segment data sheet when he asked for the segment data
25 for the home and garden department, which accounted for 12 --

1 7 percent of Walmart sales. What happened? Walmart gave Mr.
2 Rogers a segment data sheet which included the gross revenue
3 for the entire company, all of the segments including
4 groceries, health and wellness, all the other categories.
5 Most of which had much, much higher percentages of supplies
6 and products than the home did.

7 And he never went back off of that. He conceded.
8 He finally had to say, well, I used the data that I got. I
9 used the data that I got.

10 But he used the wrong data. He used the nationwide
11 sales of all Walmart products, not just infringing goods or
12 even the data from the home category where the infringing
13 goods are listed. This radically skewed the data towards
14 greater variable costs, which he then deducted from the gross
15 revenue to reduce Walmart's profits.

16 And I asked him on several occasions if he could
17 correct that data, and he said no. Either he couldn't do it
18 or refused to do it. He didn't remember who gave him this
19 information. Didn't remember when he got it. And apparently
20 here's a guy who has a string of alphabet letters behind his
21 name that goes around the block. He never noticed, according
22 to him, over a four-year period that that number up there was
23 \$274 billion. Couldn't possibly be the revenue that was
24 earned just in the 7 percent of the products that included
25 the barbecue grills.

1 This is where you really have to use your common
2 sense and your life experience. Do you think a company the
3 size and sophistication of Walmart would not be able to pull
4 up data regarding their sales in the home and garden area if
5 they had asked for it? I don't know what Mr. Rogers asked
6 for. It could be anything. He may have had the home and
7 garden data first and the numbers didn't look right. He may
8 have kept going up the ladder looking for a higher SG&A until
9 he got one he was happy with at the very top. I don't know,
10 and the thing is neither do you.

11 The Judge is going to give you an instruction on
12 impeachment. And we're not talking about what happens when
13 you kick a politician out of office. What we're talking
14 about is what happens when a witness gives testimony which
15 you conclude is false or unreliable. You have the right at
16 that point to reject and not believe everything he says.

17 The Backyard trademark statute makes it very clear,
18 and in fact I confirmed this with Mr. Rogers, that all the
19 plaintiff has to do is prove the defendant's sales when
20 you're talking about profits. Quote, defendant must prove
21 all elements of cost or deduction claimed, close quotes.

22 What reliable evidence, reliable evidence, have you
23 heard about the sales, general and administrative costs
24 applicable to the \$910 million worth of barbecue grills and
25 accessories, which are the only issue in this case.

1 Now, they paid Mr. Rogers a great deal of money, 2,
2 \$300,000. I think Walmart should expect more than what they
3 got for that amount of money, but you should expect a lot
4 more, because what you have been given is information that is
5 at a minimum totally unreliable, unrelated to the products in
6 question and quite possibly false.

7 Now, damages. Mr. Puzella takes Variety to task
8 because we didn't cross-examine Mr. Rogers much on damages.
9 Didn't have to. He said at the close of his testimony that
10 he's not a lawyer. And in fact, I pointed out a quote to him
11 in his own report that said he simply relied on the
12 information that was provided by the lawyers. You remember
13 he, first of all, denied it. Then I had to go dig out the
14 exhibit and threw it up there and highlight it so he could
15 essentially be forced to admit that, yes, his own report says
16 that all he did was parrot the information given him by
17 Walmart's lawyers.

18 And a good example was what I refer to as the Clear
19 Blue case, where he cited that case for the proposition that
20 there had to be a license agreement negotiation between the
21 parties for it to be proper to award a royalty in this
22 situation of a hypothetical royalty. Then I had to confront
23 him again with the actual language from the Court's opinion
24 which said exactly the opposite.

25 Now, there are going to be some exhibits for you to

1 look at. PX-24. That's the profits exhibit. And PX-27,
2 which is the damages exhibit. Now, I'm not going to be as
3 dogmatic as Mr. Puzella, even though he bobbed and weaved a
4 little bit about the royalties and the profits. What it
5 boiled down to is the two big fat zeros. That's all Walmart
6 is going to be satisfied with.

7 Variety, on the other hand, is giving you a fairly
8 wide range. You can use your expertise, your judgment and
9 your experience, your qualities that you acquired of a --
10 through a lifetime of handling your own affairs and perhaps
11 the affairs of your customers or family and you decide what
12 you think is reasonable. Variety asks you to make Walmart
13 pay Variety what, in fairness, it should have paid for the
14 right to use The Backyard trademark by writing the amount you
15 think reasonable and supported by the evidence in the
16 appropriate line. It will be very much like the verdict form
17 you saw last October. We believe the evidence supports, as
18 far as the royalty is concerned, an award of between roughly
19 \$45 million and \$91 million.

20 As far as profits are concerned, you know, we
21 agreed with Walmart just to make things move easier. There's
22 no argument about the cost of goods. \$661 million more or
23 less. But Mr. Rogers' report went up in flames. That report
24 is incredible, unreliable and littered with false testimony.
25 Take a look, if you have it handy, at PX-16. This is the

1 testimony statute I just read. The paragraph that says all
2 we have to do is show the gross revenue. All Walmart has to
3 do is prove everything else. So did they prove everything
4 else? No.

5 We caught Mr. Rogers red-handed. But again, don't
6 fault just Mr. Rogers on this. He said he had talked to the
7 Walmart people on several occasions. That is the information
8 he was given. Now, he should have known better. And an
9 accountant and CPA, whatever he is, if he can't distinguish
10 the difference between \$910 million and \$274 million (sic),
11 for example, he's in the wrong business.

12 And I have to give credit to Mr. Long here because,
13 you know, for the longest time we didn't catch it either and
14 he kept digging, digging, digging until he realized looking
15 at that form that can't possibly be right. And it was a
16 simple matter of looking at a couple of annual reports and
17 10-K. The whole thing became clear.

18 And finally, what seems fair to you. Which party,
19 Variety or Walmart, has honored this courtroom with truthful
20 testimony and reasonable arguments. We're confident that
21 Variety is that party. And we ask you to award the profits
22 and damages in the manner, in the amount that we ask.

23 Thank you so much.

24 ///

25 ///

INSTRUCTIONS

(By the Court)

THE COURT: Ladies and gentlemen, you've heard all the evidence at this phase of the trial and the final arguments. It's my duty to give you instructions on the rules of law. You have to follow the law. As you know, you're the judges of the facts. It's my job and my obligation is to preside over the trial and to determine Rules of Evidence or admissions of evidence under the law. It's your duty to follow the law -- you have to follow the Court's instructions. You can't substitute your own opinion of the law.

It's your duty to base your verdict solely upon the testimony and the evidence in the case without any bias or sympathy or prejudice. That's the promise that you made and the oath that you took when you were seated as jurors in this case some time ago. You must consider only the evidence, which includes the sworn testimony of witnesses and the exhibits that have been received.

You will recall that the statements, objections and arguments made by the lawyers are not evidence in the case. The lawyers have an important duty to point out those things that are most significant or helpful to their position in the case and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In

1 the final analysis, it's your own recollection and your
2 interpretation of the evidence that controls in the case. In
3 other words, what the lawyers say is not binding upon you.

4 During the course of the trial if I made any
5 comment or any ruling or asked any question, you're not to
6 presume from that that I have any position about the outcome
7 of the case. I do not.

8 While you may consider only the evidence, you're
9 permitted to draw such reasonable inferences from the
10 testimony and the exhibits that you feel are justified in the
11 light of your common experience. You may make such
12 deductions and reach such conclusions which your reason and
13 your common sense lead you to draw from the facts which have
14 been established by the testimony and the evidence in the
15 case.

16 You may consider both the direct and the
17 circumstantial evidence. Direct evidence is the testimony of
18 one who observed actual knowledge of the facts such as an
19 eyewitness. Circumstantial evidence is proof of a chain of
20 facts or circumstances indicating one of the issues in the
21 case.

22 Now, I've said that you must consider all of the
23 evidence. This does not mean that you must accept all the
24 evidence as true or as accurate. You are the sole judges of
25 the credibility or believability of each witness and the

1 weight or importance that you want to place on that witness's
2 testimony. In weighing the testimony of a witness you may
3 consider that person's relationship to one party or the
4 other, the interest, if any, that the person has in the
5 outcome of the case, a person's manner of testifying, a
6 person's opportunity to observe and acquire knowledge about
7 the facts which they are testifying to, the witness's candor,
8 fairness and intelligence, and the extent to which what the
9 witness says is either supported by or contradicted by other
10 believable evidence in the case. A witness who testifies may
11 be discredited or impeached by contradictory evidence or by
12 showing that the witness testified falsely or incorrectly
13 about an important matter or by evidence that at some other
14 time the witness has said or done something or has failed to
15 say or do something which is inconsistent with the witness's
16 present testimony.

17 The Rules of Evidence provide that if scientific,
18 technical or other specialized knowledge may assist you, as
19 the jury, in understanding the evidence or in determining a
20 fact in issue, a witness qualified as an expert by their
21 knowledge, skill, experience, training or education may
22 testify and state that person's opinion about certain
23 matters. You should consider each expert opinion received in
24 evidence in the case and give it such weight as you think it
25 deserves. If you decide that the opinion of an expert

1 witness is not based on sufficient education and experience,
2 or if you decide that the reasons given in support of the
3 opinion are not sound or that the opinion is outweighed by
4 other evidence, then you may disregard the opinion entirely.

5 Now, this verdict sheet or verdict form will be
6 with you in the jury room. Question one is what amount of a
7 reasonable royalty, if any, should be awarded to the
8 plaintiff Variety as a result of defendant Walmart's
9 trademark infringement. If you decide that issue, you're to
10 fill in what amount you decide. Your verdict has to be
11 unanimous. The burden of proof is on the plaintiff on both
12 issues in the verdict.

13 And the burden of proof is proof by a preponderance
14 of the evidence, which means that when you consider the
15 evidence in favor of the party with the burden of proof and
16 the evidence opposed to it, the party who has the burden of
17 proof must show that it's more likely true than not true. So
18 they have to tip the scale. The scale has to go in their
19 favor ever so slightly. If it's dead even or if it goes the
20 other way, then they haven't satisfied their burden. That's
21 what the burden of proof is.

22 The second question is what amount of profits
23 earned by the defendant Walmart from the infringing sales, if
24 any, should be awarded to the plaintiff Variety. As I said,
25 the burden of proof by a preponderance of the evidence is on

1 Variety on both issues.

2 You have to determine what amount of money should
3 be awarded to Variety as a result of Walmart's infringement.
4 Variety has the burden of proving the amount of money you are
5 to award by a preponderance of the evidence.

6 Two kinds of monetary relief may be considered in
7 this case. First, compensatory damages and second, Walmart's
8 profits from the sales of infringing goods. The fact that
9 Walmart did not actually intend, anticipate or contemplate
10 that damages to Variety would result is not a basis for you
11 to deny award of money to Variety.

12 Compensatory damages are sometimes referred to as
13 actual damages. Compensatory damages consist of Variety's
14 direct economic losses resulting from the effect of Walmart's
15 conduct. Compensatory damages mean the amount of money that
16 will reasonably and fairly compensate Variety for any injury
17 you find was caused by Walmart's infringement or unfair
18 competition.

19 The basic question for your consideration is what
20 is the amount of money required to right the wrong done to
21 Variety by Walmart. In determining compensatory damages, any
22 difficulty or uncertainty in ascertaining the precise amount
23 of the damage -- of any damages does not preclude recovery.
24 Instead, you should use your best judgment in determining
25 such damages.

1 You may not determine damages by speculation or
2 pure conjecture. In this case, Variety seeks compensatory
3 damages in the form of lost royalty revenue that Variety
4 would have received from Walmart if Walmart had secured a
5 license from Variety to use the Variety trademark. In
6 addition to actual damages, Variety is entitled to recover
7 their profits earned by Walmart as a result of its
8 infringement. You may decide to award profits for different
9 reasons including -- well, in this case Variety is seeking an
10 award of Walmart's profits by making infringement
11 unprofitable.

12 While you generally may award any amount of profit
13 you find appropriate, any award of profits -- any amount you
14 took into account in determining compensatory damages. So
15 the damages are exclusive of each other. Profit is
16 determined by deducting Walmart's provable and legally
17 deductible expenses from its gross revenues. Gross revenue
18 is all of the Walmart receipts earned or collected by it in
19 the sale of its products bearing the infringing trademark.

20 Variety has the burden of proving Walmart's gross
21 receipts by a preponderance of the evidence. Walmart has the
22 burden to prove the amount of allowable and deductible
23 expenses by a preponderance of the evidence. You will
24 subtract those expenses from the gross revenue amount to
25 determine Walmart's profits.

1 Walmart bears the burden of proving the expenses
2 incurred in the sale or advertisement of products bearing the
3 infringing trademarks. If Walmart fails to prove its direct
4 expenses, you must find the amount of Walmart's gross
5 revenues to be the amount of Walmart's profits. The
6 deductible expenses cannot be speculative. You should reject
7 Walmart's proof of the deductible expense if you find that
8 Walmart failed to properly substantiate and document each
9 expense.

10 Fixed costs are those costs that do not vary
11 depending on sales level such as rent, property tax or
12 insurance. In other words, these are the costs that Walmart
13 would have incurred in the ordinary course of its business
14 even without selling its Backyard Grill products. Fixed
15 costs are not deductible from your profit calculation.
16 Variable costs are costs of labor or material that change
17 according to the -- change in the sales volume of Walmart's
18 products. Generally those variable costs are directly
19 attributable to the sale or advertisement of the infringing
20 products and are deductible from the profit calculation.
21 Walmart must present proper and accurate documentation that
22 the claimed variable costs are directly attributable to the
23 sale or advertisement of its products.

24 When you go back to your jury room select someone
25 to be your foreperson. I don't specifically recall

1 whether -- who was the foreperson in the earlier trial, but I
2 think -- it may have been Mr. Anderson? No.

3 THE JUROR: Sir.

4 THE COURT: Ms. Ritchie.

5 THE JUROR: Um-hum.

6 THE COURT: You can either continue if that's the
7 sense of the group or someone else can be, but select someone
8 to be your foreperson and engage in your deliberations. Your
9 verdict has to be unanimous. When you've reached a verdict,
10 let the marshal know.

11 In the course of your deliberations you're to honor
12 each other's opinion and be open to changing your opinion if
13 you are convinced it is in error, but you're not required to
14 surrender your honest conviction as to the force and effect
15 of the evidence just because of the opinion of a fellow
16 juror.

17 Let me see the lawyers up here.

18 **BENCH CONFERENCE**

19 (On the Record)

20 THE COURT: Objections from the plaintiff?

21 MR. ADAMS: None, your Honor.

22 THE COURT: From the defendant?

23 MR. HOSP: Yes, your Honor. Renew all the
24 objections I covered before. We include the instruction
25 failed to instruct the jury on Synergistic factors. Failed

1 to instruct the jury on Variety's burden on royalties,
2 including first to show that Walmart's conduct actually
3 caused Variety harm in the form of lost royalties; second, to
4 show that the royalty it seeks is rationally related to
5 Walmart's use of Backyard Grill; third, to show other
6 reasonable possibility that Walmart would have taken and
7 Variety would have granted a royalty; fourth, to prove a
8 royalty amount with reasonable certainty.

9 With respect to Walmart's profits, the instruction
10 failed to instruct the jury first that Variety cannot receive
11 both royalty and Walmart's profits; second, that Walmart's
12 profits can only be awarded as compensation, not as penal;
13 third, regarding the proper computation of available profits;
14 fourth, regarding Walmart's right to prove the portion of its
15 profits that are not attributable to its use of Backyard
16 Grill; fifth, regarding the categories of costs that Walmart
17 may prove should be deducted from its profits.

18 And finally, there should have been a limiting
19 instruction with respect to deterrence, and I believe the
20 changes were made to the proposed instructions that we used
21 from -- the plaintiffs actually included, at least a sense of
22 deterrence. So I think that was not cured.

23 THE COURT: I've considered all of those and denied
24 them. I find the instructions to be comprehensive, complete
25 and understood by the jury.

1 You can go back to your seats.

2 (Conclusion of Bench Conference)

3 (Open Court)

4 THE COURT: Ladies and gentlemen, you can retire to
5 your jury room. The clerk will give you any exhibits.

6 (Jury out to deliberate at 3:52 p.m.)

7 (Informal recess at 3:52 p.m. to 5:15 p.m.)

8 (Jury verdict at 5:15 p.m.)

9 THE COURT: The jury says they have a verdict so
10 we'll bring them in.

11 (Jury in at 5:19 p.m.)

12 THE COURT: Let's see, Ms. R, are you the
13 foreperson?

14 THE FOREPERSON: Yes.

15 THE COURT: You can all have a seat.

16 Mr. Marshal, if you'll take the --

17 (The Marshal tendering the verdict form to the Court)

18 THE COURT: All right. On question 2, the verdict
19 of the jury is \$50 million. On question 1, the verdict of
20 the jury is \$45,536,846.71.

21 Is that your verdict and do you all assent to it?

22 (All jurors respond affirmatively)

23 THE COURT: All right. Thank you very much for
24 your faithful service. You've been here through this
25 extended trial and I really appreciate your dedication and

1 your work, and at this point you'll be dismissed and you
2 don't have to return and you can be excused the next time.

3 (Jury out at 5:21 p.m.)

4 THE COURT: You can have a seat. I want to thank
5 the lawyers for their long and dedicated work for what's now
6 almost five years. And if you want to file any motions or
7 address anything, I'll hear from you after, but thank you for
8 your service.

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10 (Proceedings concluding at 5:22 p.m.)
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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3

4 CERTIFICATE OF OFFICIAL REPORTER
5

6 I, Michelle A. McGirr, RPR, CRR, CRC, Federal
7 Official Court Reporter, in and for the United States
8 District Court for the Eastern District of North Carolina, do
9 hereby certify that pursuant to Section 753, Title 28, United
10 States Code, that the foregoing is a true and accurate
11 transcript of my stenographically reported proceedings held
12 in the above-entitled matter and that the transcript page
13 format is in conformance with the regulations of the Judicial
14 Conference of the United States.
15

16 Dated this 15th day of April, 2019
17

18 /s/ Michelle A. McGirr
19 MICHELLE A. MCGIRR
20 RPR, CRR, CRC
21 U.S. Official Court Reporter
22
23
24
25